United Nations A/HRC/36/43

General Assembly

Distr.: General
2 August 2017

Original: English

Human Rights Council
Thirty-sixth session
11-29 September 2017
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Urmila Bhoola, submitted pursuant to Human Rights Council resolution 33/1.

GE.17-13209(E)

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I. Introduction and summary of recent activities

A. Participation in consultations and conferences

1. Since she presented her previous report to the Human Rights Council (A/HRC/33/46), the Special Rapporteur on contemporary forms of slavery, including its causes and consequences has participated in a wide range of international conferences and initiatives relating to the contemporary forms of slavery. In September 2016, the she attended a meeting convened by the Prime Minister of the United Kingdom of Great Britain and Northern Ireland and attended by other heads of State, United Nations agencies and civil society experts in the margins of the seventy-first session of the General Assembly.

2. In December 2016, the Special Rapporteur participated in a panel discussion on child slavery with the United Nations High Commissioner for Human Rights and other stakeholders, convened by the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery. The Fund assists individuals, whose human rights have been severely violated as a result of contemporary forms of slavery. It provides vital direct humanitarian, legal and financial assistance to victims through grants awarded to non-governmental organizations (NGOs). Throughout the implementation of her mandate over the past year, the Special Rapporteur has worked in collaboration with the Fund. She thanks its members for their ongoing support to all elements of her work and encourages Member States to support their work.

3. In March 2017, the Special Rapporteur gave a presentation at the Security Council ministerial open debate on trafficking in persons in conflict situations, including forced labour, slavery and other similar practices. In her statement, she called for greater coordination and leadership on slavery and related phenomena and for States members of the Security Council to ratify and implement international standards.

4. In the past year, the Special Rapporteur has engaged with "SDG Alliance 8.7", a multi-stakeholder coalition committed to accelerating and intensifying actions to achieve target 8.7 of the Sustainable Development Goals. As such, she attended the high-level launch of the initiative in New York in September 2016 and a consultation on child labour and forced labour in Addis Ababa in June 2017.

B. Country and follow-up visits

5. Since her presentation to the Human Rights Council at its thirty-third session, the Special Rapporteur conducted a country visit to Paraguay from 17 to 24 July 2017. The purpose of the visit was to address the causes and consequences of contemporary forms of slavery in the country, identify good practices undertaken by the Government, investigate the challenges and develop recommendations for how efforts to eradicate slavery could be accelerated. A report summarizing the visit will be available as an addendum to the Special Rapporteur's report to the General Assembly at its seventy-third session.

6. In addition to the above-mentioned fact-finding visit, the Special Rapporteur conducted visits to Mauritania and the Niger in April and August 2017, respectively, in order to conduct workshops to assess the implementation of the mandate's previous recommendations.

II. Legal elements of the right to have access to justice and remedy

7. The term "contemporary forms of slavery" covers the practices prohibited by the Slavery Convention of 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 and the International Labour Organization (ILO) Forced Labour Convention, 1930 (No. 29). Considering the practices covered by the mandate of the Special Rapporteur and the legal

definitions stipulated in those international instruments, the practices encompassed by the term "contemporary forms of slavery" cover traditional slavery; the institutions and practices similar to slavery, such as debt bondage, serfdom and forced marriage; and forced labour. The present report focuses on access to justice and remedy for victims of contemporary forms of slavery, particularly for persons subjected to practices in the context of labour exploitation that satisfy the legal definitions of slavery; debt bondage; and forced labour. That focus reflects the information submitted by different stakeholders and Member States in response to the questionnaire prepared by the Special Rapporteur on access to justice and remedy for victims of contemporary forms of slavery.

A. General characteristics of slavery, institutions and practices similar to slavery, servitude and forced labour

8. A hierarchy in international law exists among slavery and other forms of exploitation, with slavery being the most severe type of exploitation.[1] The element of control of the person or his/her labour is present in the various forms of exploitation to different degrees, and the most extreme form of control is manifested when it exhibits powers attached to ownership. This accounts for a distinction between slavery and other lesser exploitive practices, such as forced labour, servitude and the institutions and practices similar to slavery. However, such practices can also constitute "slavery" in law and can be prosecuted as such if they manifest any or all of the powers relating to the right of ownership or if the control exercised over the person subjected to the practices is equivalent to possession of the person.

1. Slavery, forced labour, institutions and practices similar to slavery and servitude

9. The Slavery Convention defines slavery in its article 1.1 as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". That definition relates not only to the de jure status of slavery, but the de facto condition of slavery; it is not restricted to legal ownership — a status that has been abolished worldwide — but to a lived condition in which one individual exercises over another powers that are similar to or attach themselves to the right of ownership. A situation of de facto slavery implies that a person can exercise over another "any or all" of the powers attached to ownership in circumstances where control tantamount to possession is present; that type of control constitutes a prerequisite for any de facto exercise of the powers attaching to ownership.[2]

10. In furtherance of the elements contained in article 2.1 of its Forced Labour Convention, 1930 (No. 29), ILO has defined forced labour as work for which a person has not offered him or herself voluntarily (concept of "involuntariness") and which is performed under menace of any penalty (concept of "coercion") applied by an employer or a third party to the worker. The four "institutions and practices similar to slavery" defined in the 1956 Supplementary Convention, referred to collectively as "servile status", should be understood as conventional servitudes. They are: debt bondage; serfdom; forced marriage; and a category that has been subsequently known as "the sale of children". Furthermore, the notion of "servitude" has also been defined through the decisions of adjudicative organs related to human rights.[3]

2. Legal status of the prohibition of slavery

11. The prohibition of slavery has attained *jus cogens* status and constitutes an obligation *erga omnes*. The recognition of slavery as *jus cogens* entails the duty to prosecute or extradite, the non-applicability of statutes of limitation and universality of

[1] Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation* (2015).

[2] Ibid. See also report of the Secretary-General on slavery, the slave trade and other forms of servitude (E/2357).

[3] See *Siliadin v. France*, European Court of Human Rights, Application 73316/01 (2005), paras. 123-124.

jurisdiction over the practice of slavery, regardless of where it is committed, by whom and against what category of victims.[4] The International Court of Justice has identified the protection from slavery as an example of an obligation *erga omnes*.[5] The practice of slavery has been universally accepted as a crime against humanity,[6] and the right to be free from enslavement is considered so fundamental that all States can bring before the Court cases where other States have violated that right.[7]

B. State responsibility and the standard of due diligence

12. The obligation of States to provide remedies and the right to have access to remedies can arise directly or indirectly under the rules of responsibility. The obligation arises directly when the State is active or complicit in subjecting an individual to slavery, servitude, practices and institutions similar to slavery and forced labour. On the contrary, the obligation arises indirectly when the State is not implicated in the harm but has failed to prevent it or respond appropriately (e.g. when the State has failed to exercise due diligence to investigate and prosecute perpetrators and to assist and protect victims).

13. The principle of State responsibility confirms that States have an obligation to act with due diligence, which entails the exercise of a measure of care in preventing and responding to acts by private persons or entities that interfere with established rights. Under the standard of due diligence, the State is not responsible for the acts of others, but for its failure to prevent, investigate, prosecute or provide redress for the harm caused. The general obligations of States extend beyond negative obligations of non-interference and include positive obligations, such as legislative reform, the provision of remedies and protection from non-State interference.

1. Obligation to ensure that subjecting a person to slavery, servitude, practices and institutions similar to slavery and forced labour is defined in law as a crime[8]

14. States have an obligation to adopt appropriate legislation penalizing slavery, servitude, practices and institutions similar to slavery and forced labour. this legislation must be sufficiently clear and detailed and provide a punishment commensurate to the crime. In its 2005 judgment in the *Siliadin v. France* case, concerning a woman who had been held in servitude as a domestic worker in France and for the first two years of her exploitation had been a child (aged under 18 years), the European Court of Human Rights observed that the legislation in France regarding servitude had been vague and the penalties imposed had been inappropriately lenient. Referring to the obligations of France as a State party to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery and to the Convention on the Rights of the Child the Court considered that

> Limiting compliance with article 4 of the [the Convention for the Protection of Human Rights and Fundamental Freedoms] only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective. ... States have positive obligations ... to adopt criminal-law provisions which penalize the practices referred to in Article 4 and to apply them in practice.[9]

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[4] See M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligations Erga Omnes", in *Law And Contemporary Problems*, Vol. 59, Iss. 4 (1996).

[5] See Barcelona Traction, Light and Power Co, Ltd. (*Belgium v. Spain*), 1971 I.C.J. 32. (Feb. 5).

[6] Article 7 (2) (c) of the Rome Statute of the International Criminal Court characterizes "enslavement" as a crime against humanity falling within the jurisdiction of the Court.

[7] See R.C. Redman, "The League of Nations and the Right to be Free from Enslavement: the First Human Right to be Recognized as Customary International Law", in *Chicago-Kent Law Review*, Vol. 70, Iss. 2, pp. 759-800 (1994).

[8] See annex for additional relevant jurisprudence at the regional level.

[9] See Council of Europe, European Court of Human Rights, *Siliadin v. France* (Application 73316/01), 26 July 2005, para. 89.

The Court concluded that "the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim"[10] and that the State had violated its positive obligations under article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits slavery, servitude and forced labour.

2. Obligation to ensure that offences involving slavery, servitude, practices and institutions similar to slavery and forced labour are investigated and prosecuted with due diligence

15. The due diligence standard imposes a positive duty on States to ensure the effective enforcement of their criminal law through effective investigation and prosecution of perpetrators. The Economic Community of West African States (ECOWAS) Court of Justice, in its 2008 case *Hadijatou Mani Koraou v. The Republic of Niger*, concerning a woman who had been sold at age of 12 to a local tribal chief and placed in a servile status, referred to the duty of States to investigate and prosecute crime. The laws of the Niger prohibited slavery and servitude, but when State officials were informed of the exploitation of the woman they took no action to protect her. The Court observed that "the national judge, when having to rule on a matter relating to the status of persons (as in the case of the applicant) should as soon as the case raises facts relating to servitude, deal with the case relating to servitude and follow the stipulated procedure for punishing the crime".[11] The Court concluded that the applicant had been a victim of slavery and that the Niger was responsible for its administrative and judicial authorities' failure to act with regard to the practice.

16. In 2016, the Inter-American Court of Human Rights issued a judgment in the case of *Hacienda Brasil Verde Workers v. Brasil* concerning the situation of workers, primarily men of African descent, coming from the country's poorest states, who were subjected to slave labour in a privately owned estate located in the northern part of the country. The Court observed that the obligation to guarantee the right of freedom from slavery, recognized in article 6 of the American Convention on Human Rights, entails the duty of the State to prevent and investigate possible situations of slavery, servitude, trafficking in persons and forced labour.[12] The Court considered that:

> States have the obligation to: initiate ex officio and immediately an effective investigation that enables the identification, prosecution and sanction of those responsible when there exists a complaint or serious reason to believe that persons under their jurisdiction are subjected to the practices stipulated in article 6.1 and 6.2 of the Convention (on slavery, involuntary servitude, traffic in women and forced labour); … conduct inspections or other measures to detect such practices; and adopt measures to protect and assist victims.

The Court observed that, under the circumstances of the case, there was a special obligation to act with due diligence and that that obligation had not been fulfilled by the State.[13]

3. Obligation to provide a remedy to persons subjected to contemporary forms of slavery

17. The duty of a State to provide domestic legal remedy to victims of human rights violations for the harms suffered in their territory is well established in international and regional human rights instruments (see annex). The obligation of States to provide a remedy has two components: (a) justice for victims through procedural mechanisms

[10] Ibid. paras. 148-149.

[11] ECOWAS Court of Justice, Judgment No. ECW/CCJ/JUD/06/08 of 27 October 2008, *Hadijatou Mani Koraou v. The Republic of Niger*, para. 82 (unofficial translation).

[12] *Hacienda Brasil Verde Workers v. Brasil*, American Convention on Human Rights, October 2016, para. 319 (unofficial translation).

[13] Ibid. para. 368.

(procedural remedies); resulting in (b) final positive relief (substantive reparations).[14] The nature of the procedural remedies (judicial, administrative or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in granting appropriate relief for such violations. In the case of grave abuses, such as slavery, practices and institutions similar to slavery and forced labour, remedies need to be judicial. However, States can also provide other non-judicial remedies to complement reparation procedures. A right of access to effective remedies entails the availability of such remedies under criminal or civil law, and States should ensure that victims are provided with information and assistance that will enable them to secure the reparations to which they are entitled.

18. The reparations for victims of slavery, practices and institutions similar to slavery, servitude and forced labour should be accessible, affordable, timely, full and effective, while respecting the principles of appropriateness and proportionality. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law advise that reparations for victims should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

III. Challenges and obstacles encountered by persons subjected to contemporary forms of slavery to access justice

A. Social and cultural barriers

1. Discrimination and social structures

19. Persons subjected to contemporary forms of slavery often belong to populations that are likely to be discriminated against, including women, children, indigenous people, people of "low" caste status and migrant workers. The societal discrimination that minority groups suffer denies their right to equal access to justice: often, State officials, including the police, prosecutors and the judiciary, are inherently prejudiced against people belonging to such groups. As a result, they experience discrimination at every step in the administration of justice for their rights violations. This situation is exacerbated when the groups are not represented within law enforcement authorities. Furthermore, the wide discrimination that people belonging to such groups suffer results in them having a sense of inferiority, which often poses challenges in their deciding to claim their rights or report the abuse they have suffered.

People of "low" caste status, indigenous people and other minority groups

20. In South Asia, debt bondage and forced labour is reported to be widespread in countries such as Bangladesh India, Nepal and Pakistan.[15] Those who are trapped in debt bondage in South Asia are predominantly Dalits, of "low" caste status, indigenous people or other minority groups. In some countries, a hierarchy of work has been created as a result of community divisions under which labourers are put at the lower level, particularly those of "low" caste status or those belonging to ethnic and religious minorities. An individual's access to justice, jobs and other rights and privileges are often conditioned by this social hierarchy. This results in discrimination, domination, inequality and disparity, primarily through a lack of cultural and social power and access to resources for people who belong to minority groups. Furthermore, those who opt to defy traditional exploitative, discriminatory and humiliating roles, often face social boycotts that further restrict any opportunity to overcome discrimination-related poverty and dependency on employers or landlords.

[14] See REDRESS, "Implementing Victim's Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation" (2006). Available from www.redress.org/downloads/publications/Reparation%20Principles.pdf.

[15] Submissions to the Special Rapporteur from the organizations READ, DSN-UK and the Nepal National Dalit Social Welfare Organization. See also A/HRC/33/46.

21. In some African countries, even though slavery is a crime, the practice of slavery persists and is entrenched in social structures and cultural beliefs, and people subjected to that practice are often unaware that their situation is illegal or unjust. People subjected to slavery are often at the bottom of a social hierarchy based along ethnic and racial lines and suffer widespread discrimination and social exclusion; they are in some instances treated by perpetrators as commodities that can be sold, loaned or offered as a marriage gift, and receive no payment for their work. In Mauritania, the Haratine (also known as black Moors) constitute the largest ethnic group. They suffer discrimination, marginalization in the political and economic sphere and are particularly affected by slavery.[16] In the Niger, slavery has been reported to exists in the Tuareg, Fulani (Peul), Toubou and Arab communities, which are hierarchical societies dominated by powerful traditional chiefs.[17]

22. In Latin America, in countries such as Guatemala, Paraguay and the Plurinational State of Bolivia, poverty and social exclusion affecting indigenous people in isolated areas often create conditions that enable the continuation of practices such as debt bondage and forced labour. Obstacles encountered by indigenous people in attempting to gain access to the justice system are generally a function of the social exclusion and ethnic discrimination that they have historically suffered,[18] coupled in some cases by a lack of recognition of ethnic diversity by elites and the authorities.[19] A barrier often encountered by indigenous people to access justice is the lack of sensitivity and in some cases lack of consideration by the justice system of their practices and customs (e.g. the prohibition of the use of indigenous language in judicial proceedings particularly in cases where they lack knowledge of the official language).

Cross-border migrant workers

23. The Arab states, North America and Northern, Southern and Western Europe, which typically include high-income countries, are major destination countries for migrant workers.[20] The majority of people trafficked for labour exploitation to those regions are migrant workers and are involved in a variety of jobs, including domestic work, agricultural work and construction. The irregular employment or migration status of some migrant workers make them particularly vulnerable to exploitation and creates barriers to them seeking legal redress. This has a gender dimension since large numbers of migrants in unskilled and unregulated sectors are women.[21] A rise in anti-immigrant sentiment in many countries, stricter migration polices and the prosecution for migration-related criminal offences constitute challenges for migrant workers to gain access to justice. Often they are treated as perpetrators of an immigration crime, risking imprisonment or deportation, rather than as victims entitled to protection, assistance and redress. Furthermore, victims of trafficking for labour exploitation are often detained, prosecuted or punished for crimes they are forced to commit as a result of being trafficked.[22]

24. Regular migrants who are given work permits can also be subjected to labour exploitation, particularly when their work permit ties them to a single employer. In some countries of the Cooperation Council for the Arab States of the Gulf, and Arab states such as Bahrain, Lebanon, Saudi Arabia, the United Arab Emirates, migrant workers are

[16] See A/HRC/15/20/Add.2, paras. 5 and 12.

[17] See A/HRC/30/35/Add.1, paras. 34-36.

[18] See Inter-American Commission on Human Rights, *Captive Communities: Situation of the Guarani Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco* (2009). Available from www.oas.org/en/iachr/indigenous/docs/pdf/CAPTIVECOMMUNITIES.pdf.

[19] See Julio Faundez, "Access to justice and indigenous communities in Latiin America", in *Marginalized communities and access to justice* (Yash Ghai and Jill Cottrell, eds.) Chapter 5 (2009).

[20] See ILO, *Global Estimates on Migrant Workers: Results and Methodology, Special focus on migrant domestic workers* (2015). Available from www.ilo.ch/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_436343.pdf.

[21] See Organization for Security and Cooperation in Europe, *An Agenda for Prevention: Trafficking for Labour Exploitation* (Vienna, 2011), Chap. 2.

[22] As a matter of international law, victims of human trafficking should not be detained, prosecuted or punished for crimes they are forced to commit as a result of being trafficked (see European Union Trafficking Directive (2011/36), article 8).

particularly vulnerable to exploitation and a primary barrier to ensuring them access to justice is the *kafala* system of labour sponsorship, by which migrant workers are required to obtain sponsorship from their employers in order to live and work in the country. Domestic migrant workers are among the most vulnerable and can face specific barriers to gaining access to justice and remedy, including severe restrictions on their freedom of movement, such as passport confiscation and an inability to leave their work premises, and a dependence on their employers for retaining regular migration status.

2. Self-identification and lack of trust in the justice system

25. The relationship between potential victims and offenders can sometimes be contradictory. Some persons subjected to contemporary forms of slavery would often not see themselves as victims of exploitation and abuse. Migrant workers, for example, who had some knowledge of the situation that they were entering, may not want to be labelled as victims, but be provided with another job and better working conditions. Also, if the perpetrator is a family member, they may not be willing to be labelled as victims or to press charges, because of emotional ties. Furthermore, victims who belong to a group of people that has suffered discrimination and exclusion over generations and live in societies where slavery crimes are embedded in traditional beliefs and customs, would often not identify themselves as victims due to the normalization of such practices.

26. Persons subjected to contemporary forms of slavery often do not have confidence in law enforcement and judicial bodies. They often consider them to be corrupt or fear they will be discriminated against or revictimized. Furthermore, the fact that legal processes tend to be prolonged and complex exacerbates their distrust of the legal system. Systemic discrimination against people of "low" caste, indigenous people, migrants and other minorities in wider society and corruption among law enforcement, coupled with victims' concerns over their particular situation (e.g. irregular status), feed into a general distrust of the police among victims and a perception that law enforcement agencies and courts exist to protect the wealthy and powerful.[23]

B. Practical barriers

27. Contemporary forms of slavery often take place in areas that are isolated and not easily accessible. This poses particular challenges to the identification of victims by the authorities as well as practical barriers to victims for accessing justice. The informal employment of workers in a range of economic activities and the fact that exploitation often occurs in hidden, inaccessible workplaces pose challenges to the identification of victims and their access to justice; informal employment is widespread in agriculture, small and medium enterprises, domestic work, among other services.[24] Furthermore, physical accessibility to justice institutions is a barrier encountered by victims, and the centralization of legal and administrative systems prevents victims from rural or remote areas from gaining access to such mechanisms. Thus, in many cases, victims exploited in places far from the main urban areas have little or no possibilities to gain access to specialized support services. Child victims in particular face enormous barriers in gaining accessing to justice.

28. Persons subjected to contemporary forms of slavery belong to groups in society that are marginalized and economically disadvantaged; they are exploited for their labour and paid low wages, not paid for their work, or their salaries are withheld; they are economically dependent on those who exploit them and this situation poses financial constraints in considering or attempting to gain access to justice. Pursuing criminal justice and participating in the procedure often involves significant expenses that victims cannot afford, including court and other filing fees, legal fees, expenses for gathering documents,

[23] Submissions to the Special Rapporteur from the organizations ASI and the Global Alliance Against Traffic in Women.

[24] See ILO, *Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children* (Geneva, 2012). Available from www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182096.pdf.

traveling to courtrooms, food and accommodation while the case is ongoing, and indirect costs such as loss of earnings.

C. Institutional and procedural barriers

1. Legislative and policy barriers

Absence of legal protection

29. The international legal framework prohibiting contemporary forms of slavery imposes on States the obligation to adopt stand-alone domestic legislation criminalizing such practices and to ensure that the penalties established are adequate and commensurate with their gravity, beyond any provisions they may have in place criminalizing trafficking in persons. However, to date, a significant number of States parties to the instruments prohibiting contemporary forms of slavery have not yet put in place provisions criminalizing forced labour, servitude and/or slavery as stand-alone offences at the domestic level.[25] Furthermore, the legal definitions developed in some States are often inadequate to enable enforcement officials to detect contemporary patterns of exploitation. The absence of clear definitions or vagueness in the law constitute major impediments for law enforcement officials to detect cases of contemporary forms of slavery and gather appropriate evidence to prove an offence has occurred in order to identify and protect victims.

30. In order to guarantee to victims of contemporary forms of slavery adequate and effective remedies, legislation prohibiting such practices should make available as remedies not only criminal proceedings but also civil compensation.[26] The burden of proof to bring criminal charges is set at a high threshold, which makes prosecution in some cases difficult. Often, prosecution is not possible owing to a lack of evidence; therefore, that avenue is only available in those few cases where the perpetrator has been convicted. Where there is no specific civil remedy stipulated by law for contemporary forms of slavery, the only option open to victims is existing civil actions, which are often inadequate to address the nature of such forms of exploitation.

31. Finally, the non-regulation of certain occupations or their exclusion from national labour laws make workers, particularly women, vulnerable to contemporary forms of slavery and constitutes an obstacle to their equal access to justice. In its general recommendation No. 26 (2008) on women migrant workers, the Committee on the Elimination of Discrimination Against Women, considering that domestic work is one of the occupations in which migrant women dominate, stated that in countries of destination, such occupations may be excluded from legal definitions of work, thereby depriving women of a variety of legal protections.

Legislation and policies that limit victims' access to justice

32. In some countries, legislation and policies exist that facilitate contemporary forms of slavery and create barriers for victims to access justice and remedy. The *kafala* system, which is in place in a number of countries in the Middle East, creates a power imbalance in the employment relationship and leaves workers with little bargaining power and vulnerable to exploitation. Migrant workers who decide to flee from an abusive employer are classified as irregular migrants and may be subjected to arrest, detention and deportation or in some cases falsely accused by their employers of having committed a crime. Furthermore, the criminalization of illegal entry to a country, illegal working or overstaying the period of a visa, denies protection to victims of contemporary forms of

[25] Submission to the Special Rapporteur by Jean Allain.

[26] See working paper of the organization FLEX entitled "Access to Compensation for Victims of Human Trafficking" (July 2016). Available from www.labourexploitation.org/sites/default/files/publications/DWP-Compensation-F.pdf.

slavery who migrate irregularly or become irregular once in the destination country.[27] That situation makes victims fear the authorities, increases control of perpetrators over them and makes it unlikely that they will complain to the authorities.

2. Lack of identification of victims

33. The non-identification of victims of contemporary forms of slavery by law enforcement agencies, labour inspectors, border management forces and other relevant competent authorities is a significant obstacle for victims in gaining accessing to justice, since identification constitutes the first step that leads to protection and to initiating the process whereby access to justice and remedy can be obtained. The reasons for the failure to identify victims include: a lack of specialized knowledge on the part of the authorities in identifying, or insufficient training about, contemporary forms of slavery, or a lack of capacity to distinguish between such practices and those that constitute less serious forms of abuse; insufficient financial resources allocated to the identification of victims; a lack of awareness among authorities and the public; and in some countries a systematic refusal by the authorities to identify, acknowledge or respond to cases of contemporary forms of slavery. The focus on the immigration status in cases of undocumented migrants subjected to contemporary forms of slavery can also lead to the misidentification of victims by the authorities.[28] Furthermore, the fact that persons subjected to contemporary forms of slavery often do not identify themselves as victims poses challenges to their identification. There are particular difficulties in identifying children who are enslaved or subjected to forced labour or servitudes, which makes it more important for law enforcement authorities to be adequately trained.

3. Lack of investigation, prosecution and punishment of perpetrators

34. Many of the countries where contemporary forms of slavery occur have limited capacity to investigate and prosecute such crimes.[29] The enforcement of laws criminalizing contemporary forms of slavery often remains ineffective owing to institutional weaknesses that are manifested in the failure of the police, prosecutors and the judiciary to respond adequately to reported cases of exploitation, from identifying and investigating to prosecuting and punishing perpetrators. Those weaknesses can be the result of a lack of training and capacity of the authorities responsible for the enforcement of legislation; a lack of political will on the part of the authorities to make victims protection a priority; susceptibility to corruption; and discrimination within the justice system against minorities. During the initial phase of the justice chain,[30] access to justice can be obstructed by weaknesses in the actions of the police, prosecutors and other authorities encountered by victims of contemporary forms of slavery. Those weaknesses are reflected in poor investigation and gathering of evidence. At the level of the administrative authorities and the police, there are often limited efforts to seek out victims, investigate cases that are brought to their attention or refer cases to prosecutors. Furthermore, at the prosecutorial level, there is often a failure to conduct criminal investigations with due diligence, and

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[27] See Global Alliance Against Traffic in Women, "Enabling Access to Justice: A CSO Perspective on the Challenges of Realising the Rights of South Asian Migrants in the Middle East" (Bangkok, 2017). Available from www.gaatw.org/publications/GAATW_Enabling%20Access%20to%20Justice_2017.pdf.

[28] See La Strada International and Anti-Slavery International, "European Action for Compensation for Trafficked Persons: Findings and Results of the European Action for Compensation for Trafficked Persons" (2012). Available from http://lastradainternational.org/lsidocs/Findings%20and%20results%20of%20Comp.Act.pdf.

[29] See D. Tolbert and L. A. Smith, "Complementarity and the Investigation and Prosecution of Slavery Crimes" in *Journal of International Criminal Justice*, Vol. 14, Iss. 2 (2016).

[30] The justice chain is the series of steps that a person has to make to gain access to justice through the formal justice system or to claim their rights. See United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), *Progress of the World's Women 2011-2012: in Pursuit of Justice* (2011), available from www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2011/progressoftheworldswomen-2011-en.pdf?vs=2835.

complaints concerning contemporary forms of slavery can be reclassified under other "lesser" and unrelated charges or informal settlements arranged. In some instances, victims are pressured from different actors, including the police and judicial officials, in order to reach an agreement to end the prosecution.[31]

4. Lack of immediate and long-term assistance

35. The absence of effective programmes and policies to provide socioeconomic support to victims of contemporary forms of slavery emerging from a situation of slavery make them vulnerable to relapsing into exploitation owing to the destitution that victims often face. Persons subjected to contemporary forms of slavery need to be able to have access to immediate and long-term assistance that enables them to restart their lives as independently as possible. Delays in the provision of assistance, complex procedures to gain access to those services along with insufficient government funding to the assistance and recovery process and the contingency of assistance to victims on cooperation with the justice system, are some of the barriers that prevent victims from accessing immediate and long-term assistance.[32] Immediately after escaping from the situation of exploitation, the victim must be provided with basic assistance, such as: housing in safe houses or shelters until the cases are closed; medical support, including basic health check-ups; mental health support; psychosocial counselling; financial aid; travel and maintenance expenses for victims and witnesses during investigation and trial; and travel and daily allowances. Once the short-term needs of the victim are met, other services aimed at ensuring long-term recovery must be provided, such as life-skills training; assistance with job seeking; reintegration assistance; vocational training; language classes; education; and social activities.

5. Lack of information and legal assistance

36. Persons subjected to contemporary forms of slavery are often not aware of the possibilities for gaining access to justice and remedy and therefore do not report the exploitation they have suffered to the authorities. However, even when victims have been officially identified, they are sometimes not provided with clear and consistent information about their rights, relevant laws and regulations, available complaint mechanisms and legal remedies; this situation is exacerbated for victims who have few language skills or are illiterate. Furthermore, victims can often be deterred from participating in legal proceedings because simple, accessible and timely legal advice is not available to them; advice is not always freely available to victims, particularly prior to engagement with authorities. In some instances, professionals who advice or assist victims of contemporary forms of slavery are not specialized in handling cases concerning such forms of exploitation; awareness and understanding of available procedures among professionals regarding available procedures has appeared to fall short. Despite legislation in place in some countries that entitles victims to legal aid, they are often unable to gain access to those services owing to a limited number of legal aid providers; persistent delays by the relevant authorities in considering requests from victims to have access to the services; and lack of resources allocated to ensure the provision of legal services. Some jurisdictions permit registered anti-slavery NGOs to bring claims on behalf of victims (such as in the anti-slavery laws in Mauritania and the Niger).

6. Weak victim and witness protection

37. The absence of any legal and administrative mechanisms to protect victims from the time their complaints are registered by the police to the conclusion of the legal proceedings denies them the right to security of life and can be a powerful incentive for them not to claim their rights to have access to justice and remedy.[33] Persons subjected to slavery and

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[31] National Dalit Movement for Justice, *Justice Under Trial, Caste Discrimination in Access to Justice before Special Courts* (New Delhi, 2014). Available from www.annihilatecaste.in/uploads/downloads/Justice%20Under%20Trial.pdf.

[32] Submissions to the Special Rapporteur from the organizations International Dalit Solidarity Network and the Freedom Fund.

[33] See *Justice Under Trial* (footnote 31 above).

related forms of exploitation, witnesses and members of the victim's family often face threats and harassment from the perpetrator, the perpetrator's community and in some cases the authorities. Such practices have been shown to have a negative influence on the outcome of trials as victims and witnesses can be intimidated into not cooperating with law enforcement authorities. In some cases, despite credible fears of reprisals, the law enforcement agencies have failed to take adequate measures to ensure victim and witness protection, despite being requested to do so by the courts.[34] The fear of reprisals from perpetrators and the sense of insecurity is often exacerbated in cases were the victims continue to live in the same community as the alleged perpetrators.

D. Challenges encountered by persons subjected to contemporary forms of slavery in gaining access to justice and remedy for violations taking place in international supply chains

38. The globalized economy has created opportunities for transnational corporations across different sectors to source goods and services at a low cost from complex chains of suppliers, and has allowed those corporations to extend their operations across national borders, including to developing countries.[35] Transnational corporations with supply chains that are long and complex are more likely to face challenges related to contemporary forms of slavery. In particular, lower levels of supply chains are often at risk of products or raw materials being sourced from home-based or small workshops in the informal economy and made under conditions that include slavery, forced labour or debt bondage.[36]

39. Access to justice and remedy for victims in that context is often constrained by legal rules limiting the liability of transnational corporations for human rights violations not directly arising from their business operations. Furthermore, the absence of laws with extraterritorial effect often denies victims of contemporary forms of slavery access to justice in cases in which the exploitation of individuals occurs in a territory different from the one where the corporation is domiciled. Often, victims are left with the only option of seeking redress in the territory where the violation has occurred and denied an effective remedy;[37] the challenges that some developing countries face in regulating companies (e.g. due to governance issues, weak or non-existent legal frameworks or lack of sufficient resources) have meant that people vulnerable to exploitation are more likely to experience corporate human rights abuses and are less able to have access to justice and remedy.

40. The measures undertaken by corporations to handle complaints of violations of workers' rights within their supply chains, such as operational-level grievance mechanisms, can play a role in facilitating access to justice and remedy and feed into the fulfilment of businesses' due diligence obligations, through the identification of adverse human rights impacts. However, several aspects of those mechanisms raise questions regarding their adequacy, which include: the unequal power dynamics between victims of contemporary forms of slavery and companies, the enforcement of the outcomes of such mechanisms and the remedies awarded not being proportionate to the harm suffered and the lack of criminal sanctions.

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[34] Office of the United Nations High Commissioner for Human Rights, *Opening the Door to Equality. Access to Justice for Dalits in Nepal* (Nepal, 2011), available from www.opendemocracy.net/beyondslavery/gscpd/urmila-bhoola/urmila-bhoola-yes. See also The Freedom Fund, Putting Justice First: Legal Strategies to Combat Human Trafficking in India, available from www.trust.org/contentAsset/raw-data/ceedfd4f-0573-4caa-85ce-d5c222570078/file.

[35] See Urmila Bhoola, "Soft law not enough to prevent slavery and exploitation" (Open Democracy, 13 September 2016). Available from www.opendemocracy.net/beyondslavery/gscp.../urmila-bhoola/urmila-bhoola-yes.

[36] See A/HRC/30/35, para. 20.

[37] Amnesty International, Injustice Incorporated, *Corporate Abuses and the Human Right to Remedy* (London, 2014). Available from www.amnesty.org/en/documents/POL30/001/2014/en/.

IV. Measures undertaken at the national level aimed at ensuring access to justice and remedy to persons subjected to contemporary forms of slavery

41. The examples of measures undertaken at the national level presented in the present section were provided by Member States, NGOs and other stakeholders in their responses to the questionnaire on access to justice and remedy prepared by the Special Rapporteur. Furthermore, reference is made to examples of measures that have been referenced by the Special Rapporteur in previous thematic and country visit reports.

National legislation, policies and programmes[*]

42. In Mauritania, Law No. 031/2015 stipulates in its article 2 that slavery constitutes a crime against humanity and it is imprescriptible. Article 7 imposes a punishment of 10 to 20 years' imprisonment for subjecting a person to slavery. Articles 22 and 23 grant *locus standi* to associations that defend human rights. Article 24 provides that victims of slavery and slavery-like practices benefit from legal assistance and are exempted from all costs and legal fees related to the proceedings. Decree No. 2016.002 established special tribunals against slavery, which are currently set up in Nouakchott, Nema and Nouadhibou and are officially operational. Furthermore, a public institution has been created to identify, propose and implement programmes to eradicate poverty and the consequences of slavery.

43. In the Niger, the Criminal Code (Act No. 61-027 of 15 July 1961) in its article 270.1 defines slavery. Article 270.2 imposes 10 to 30 years of imprisonment for slavery and a fine of between 1 million and 5 million CFA francs. Article 270.5 grants *locus standi* to any association duly registered at least one year before the occurrence of the acts concerned and mandated by its statutes to fight against slavery or similar practices.

44. In India, the 1976 Bonded Labour System (Abolition) Act and the 1976 Bonded Labour (Abolition) Rules outlawed debt bondage and were intended to free all bonded labourers, cancel their debts, establish economic rehabilitation measures and punish (through fines and imprisonment) those who employ bonded labourers. They imposed a penalty on perpetrators of up to 3 years' imprisonment and a fine of up to 2,000 rupees. The recently adopted 2016 Central Sector Scheme for Rehabilitation of Bonded Labourers increased the amount of rehabilitation paid to released bonded labourers. The Legal Services Authorities Act 1987 established legal services authorities to provide free and competent legal services to the weaker sections of society.

45. In Nepal, the Bonded Labour (Prohibition) Act, 2058 (2002) abolished the practice of bonded labour in the country and provides for penalties and fines for perpetrators. The 2002 Act requires the establishment of freed bonded labourer rehabilitation and monitoring committees in a number of districts. In Pakistan, the Bonded Labour System (Abolition) Act 1992 abolished bonded labour throughout the country and provides for 2 to 5 years' imprisonment for perpetrators and/or the impositions of a fine of 50,000 rupees. The law mandates provincial governments to set up district vigilance committees for the implementation of the law and rehabilitation of bonded labourers.

46. In Lebanon, article 586-2 of the Criminal Code criminalized slavery, with penalties ranging from 5 to 15 years' imprisonment and a fee of 100 to 500 times the minimum wage. Article 586 (8) of the Code of Criminal Procedure provides that the judge may grant a foreign victim the right to reside in Lebanon until the end of the proceedings if his/her residence in the country is illegal. In Saudi Arabia, the 1992 Basic Law of Governance provides in its article 47 that the right to litigation shall be guaranteed equally to citizens and residents and that the law shall set forth the required procedures to ensure that right. The Labour Law (issued by Royal Decree No. M/51 and amended by Royal Decree No. M/46) penalizes the withholding of wages, the confiscation of passports, excessive work hours and the employment of a worker without a written contract. In Qatar, Law No. 21 of

[*] Submissions from Argentina, Australia, Lebanon Mauritania, and Saudi Arabia and the organizations Americans for Democracy and Human Rights in Bahrain, ASI and FLEX.

2015 regulating the entry, exit and residency of expatriates is aimed at replacing the *kafala* system with a contract-based system.

67. In Argentina, the crime of servitude or other similar conditions is stipulated in article 140 of the Criminal Code and punishable by 3 to 15 years of prison. Moreover, the National Directorate for the Promotion and Strengthening of Access to Justice was created by Decree No. 1755/08 to conduct and promote activities related to legal and social programmes and communitarian support. In Brazil, article 149 of the Penal Code punishes the offence of "reducing someone to conditions analogous to slavery" with 2 to 8 years' imprisonment and a monetary fine.

68. In the United Kingdom, the Modern Slavery Act 2015 criminalizes (under the concept of "modern slavery") slavery, servitude and forced or compulsory labour. Penalties include life imprisonment for conviction on indictment, or imprisonment for a term not exceeding 12 months or a fine or both for summary conviction. Section 8 provides that criminal courts have the ability to make reparation orders in cases where a perpetrator has been convicted of slavery, servitude or forced labour. Section 47 amended the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and entitles victims to legal aid for applications for leave or remain in the United Kingdom, compensation claims under employment law and claims for damages.

69. In the Netherlands, the 2011 Act on strengthening the position of victims of crime allows victims of violent crimes and sexual offences, including victims of trafficking for purposes of forced labour, to seek an advance payment from the State if the offender was convicted and ordered to pay damages to the victim as part of a criminal sentence, and he/she fails to pay those damages within a period of eight months after the sentence has become final.

70. In Australia, the Criminal Code Act 1995 criminalizes slavery servitude and forced labour. Slavery is punishable by up to 25 years' imprisonment (Division 270). The Fair Work Ombudsman is responsible for maintaining mechanisms that provide trafficked people with the opportunity to pursue civil damages, including for unpaid wages and entitlements.

Measures undertaken in the context of supply chains

71. In France, Law. No. 2017-399 of 2017 on the duty of care of parent companies and ordering companies establishes the obligation for parent and subcontracting companies to be vigilant. The law imposes on large French companies the duty of publishing annual public vigilance plans linked to their own activities, those of companies under their control and those suppliers and subcontractors with whom they have established commercial relationships. The breach of the duty of care may result in liability for the company.

72. In the United States of America, the Trade Facilitation and Enforcement Act of 2015 prohibits the importation of goods made with forced labour (Sect. 910). The California Transparency Act of 2010 requires companies headquartered in California or doing business in the state who have worldwide annual revenues exceeding $100 million to disclose information regarding their efforts to eradicate slavery and human trafficking in their supply chains. The Trafficking Victims Protection Reauthorization Act of 2008 created an offence of knowingly benefiting from forced labour and imposes the penalty of a fine, imprisonment of up to 20 years, or both (Sect. 1589). Furthermore, the Act establishes extraterritorial jurisdiction over trafficking in persons, forced labour, slavery and involuntary servitude (Sect. 223).

73. In the United Kingdom, the 2015 Modern Slavery Act contains a provision on transparency in supply chains, requiring all United Kingdom businesses with global turnover in excess of 36 million pounds and trading in the United Kingdom to publish an annual modern slavery statement disclosing the measures taken to identify, address and prevent modern slavery in their supply chains.

V. Components of a comprehensive human rights-based approach to ensure that persons subjected to contemporary forms of slavery have access to justice and remedy

54. Ensuring effective access to justice and remedy for victims of contemporary forms of slavery is rooted in the full and effective application of the rule of law. A strong rule of law relies on effective and equitable delivery of public services, such as criminal, civil and administrative justice, legal aid and assistance and law-making, for all individuals within a jurisdiction, without discrimination. States should take all steps necessary to provide services that ensure the rule of law in a fair, effective, non-discriminatory and accountable manner, and that such services are available and accessible nationwide.

55. The adoption of legislation that criminalizes slavery, practices and institutions similar to slavery and forced labour in order to give effect to the rights of victims as established in international law is essential as a first step to ensuring the right of victims to access to justice. These laws must be fully enforced, along with other relevant laws such as those on minimum wage and non-discrimination by labour inspectors, the police, courts and other judicial actors with sufficient capacity to provide efficient and effective administration of the law. Enforcement authorities must be trained on contemporary forms of slavery in order to secure justice and prevent the inadequate collection of evidence, the imposition of lenient sentences or the prosecution of perpetrators under laws different than those prohibiting contemporary forms of slavery. In situations where legislation criminalizing contemporary forms of slavery is not implemented owing to societal discrimination against minority groups, it is essential that States acknowledge the existence of discrimination and its link with the prevalence of those practices and introduce adequate measures to ensure victims' access to justice and remedies. This entails the obligation to ensure that law enforcement officers are sensitized to the situation and rights of minority groups and that minorities are represented at all levels of government and the police force, as well as within the judiciary.

56. States have a duty to ensure that statutory agencies with a mandate to identify victims have knowledge and adequate training on contemporary forms of slavery and that the necessary resources are allocated in order to ensure that the rights of victims are protected. States should develop and disseminate operational guidelines on the different practices with indicators that help officials identify whether a particular situation could constitute the crime of slavery. Those indicators should: (a) guide them to identify possible situations of exploitation; (b) be country-specific by taking into consideration the regions and economic sectors in which these practices are prevalent; (c) be based on national legislation; and (d) allow them to distinguish between contemporary forms of slavery and other lesser forms of exploitation. Periodic training on the identification of victims should be provided to law enforcement officers, border guards, immigration officials, prosecutors, judges, labour inspectors, diplomatic and consular staff, social welfare officers and child protection officers.

57. After being identified, victims of contemporary forms of slavery must be provided with adequate immediate assistance that should not be conditional on their cooperation with the authorities and include accommodation, medical care and psychological assistance and material assistance. Furthermore, victims should also receive long-term assistance in order to help them continue to recover and rebuild their lives, including measures to facilitate their reintegration into society and gain access to sustainable livelihoods. Monitoring of policies and programmes for short-term and long-term assistance should be conducted in order to ensure they are effective and prevent victims from returning to situations of exploitation. Support to victims should include providing information and assistance to enable them to gain access to their legal rights in a language and manner that they can understand. Legal assistance should be provided free of charge by lawyers trained in working with victims of contemporary forms of slavery and at the earliest opportunity.

58. Persons subjected to contemporary forms of slavery must have access to a competent and independent authority in order to be protected and assisted appropriately and to obtain adequate reparations. Furthermore, States have a duty to ensure that competent

and independent authorities respond effectively to situations of contemporary forms of slavery and that perpetrators are investigated and prosecuted, and receive and serve sentences that are commensurate with the crime. Avenues for victims obtaining remedy and reparation should not be costly, complex or restrictive, and should offer victims of contemporary slavery redress for the damage they have suffered as a result of being subjected to such practices.

VI. Conclusions and recommendations

A. Conclusions

59. **States have an obligation to respect, promote and fulfil the right to have access to justice by making available a system of effective remedies to persons subject to their jurisdiction. That entails the obligation of States to establish or strengthen where necessary judicial and administrative mechanisms to enable victims to obtain redress through legal procedures that are expeditious, fair, inexpensive and accessible. Reparations for victims should be timely, full and effective while respecting the principles of appropriateness and proportionality and must include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. States have a legal duty to prevent contemporary forms of slavery, investigate with special diligence, and to identify and prosecute those responsible and impose appropriate punishment.**

60. **Access to justice is essential for eradicating contemporary forms of slavery and protecting the human rights of victims. However, victims often encounter within justice systems a number of challenges and obstacles of a social, legal, institutional, procedural or practical nature that affect their capacity to gain access to justice and limit the remedies available to them. In some countries where contemporary forms of slavery exist, implementation of legislation that prohibits and punishes those practices remains poor owing to weak rule of law, corruption, discrimination and social exclusion and lack of capacity among law enforcement officials to investigate and prosecute perpetrators. A comprehensive victim-centred and human rights-based approach to ensure that persons subjected to contemporary forms of slavery have access to justice and remedy must have at its centre the compliance of States with their obligations under international law as well as full restitution of the rights of victims. Recommendations on the implementation of such an approach are detailed below.**

B. Recommendations to States Members of the United Nations

61. **With respect to social and cultural barriers, the Special Rapporteur recommends that States:**

(a) **Take all steps necessary to tackle the root causes and manifestations of discrimination against minority groups that are vulnerable to contemporary forms of slavery, including women, children, indigenous people, people of "low" caste status and migrant workers;**

(b) **Ensure that minority groups are provided with decent work opportunities and full and productive employment, adequate social services and free and compulsory primary education;**

(c) **Implement effective state programmes and policies to provide socioeconomic support to victims emerging from slavery;**

(d) **Recognize the existence of discrimination and its direct link to the prevalence of contemporary forms of slavery and introduce appropriate measures to ensure that people belonging to minority groups have equal access to justice;**

(c) **Adopt national anti-discrimination legislation and take the necessary measures to ensure that institutional discrimination and societal prejudice against minority groups is eradicated in a proactive manner; in addition, implement human rights-based training on the prevention and elimination of discrimination across State institutions;**

(f) **Ensure that members of minority groups are represented within law enforcement authorities;**

(g) **Ensure that law enforcement officials are aware of their responsibility to undertake outreach work targeting persons subjected to contemporary forms of slavery, considering that victims may be unable to seek assistance, may not trust the authorities or may fear the consequences of making a complaint;**

(h) **Undertake public awareness-raising campaigns to challenge stigma and prejudices within society towards groups vulnerable to contemporary forms of slavery, and sensitize populations to the rights of such people.**

62. **In terms of practical barriers, the Special Rapporteur recommends that States:**

(a) **Allocate sufficient resources to ensure that laws can be fully implemented at the national level, including in isolated areas, and ensure that the reach of the justice system is expanded to remote and rural areas where contemporary forms of slavery are prevalent;**

(b) **Adopt measures to ensure that legal, administrative and procedural fees related to access to justice are waived for victims of contemporary forms of slavery who cannot afford them; in addition, provide financial assistance to victims that cover costs related to the proceedings, such as transportation and accommodation and other costs associated with gaining access to justice.**

63. **Regarding legislative and policy barriers, the Special Rapporteur recommends that States:**

(a) **Ratify all the Conventions in the international legal framework prohibiting contemporary forms of slavery and ensuring that persons subjected to these practices have equal access to justice and effective remedies, including the Protocol of 2014 to the ILO Forced Labour Convention, 1930 (No. 29). States should align their national legislation with these international standards, in order to adequately protect victims of contemporary forms of slavery;**

(b) **Ensure that contemporary forms of slavery are criminalized as specific crimes within national legal frameworks with adequate penalties commensurate with the crimes; all forms of contemporary forms of slavery should be criminalized as stand-alone crimes and treated separately from related phenomena such as trafficking in persons;**

(c) **Ensure that legislation adopted criminalizing contemporary forms of slavery is sufficiently clear and detailed in order for law enforcement officials to detect situations in which persons are subjected to these practices and to enforce the law;**

(d) **In addition, legislation should make it possible for victims to seek civil remedies where criminal justice fails to secure redress;**

(e) **Review or abolish legislation and policies that directly or indirectly limit access to justice to persons subjected to contemporary forms of slavery, and ensure that victims have adequate access to justice irrespective of their immigration status;**

(f) **Ensure that all labour occupations are adequately regulated and included in legal definitions of work in order to provide adequate legal protection to victims of contemporary forms of slavery.**

64. **In terms of institutional and procedural barriers, the Special Rapporteur recommends that States:**

(a) **Ensure all authorities involved in the fulfilment of the rights of victims of contemporary forms of slavery are adequately trained in the identification of victims**

including border management authorities, the police, public prosecutors, labour inspectorate and the judiciary;

(b) Provide labour inspectors with a mandate and the tools necessary to enable them to identify victims of contemporary forms of slavery proactively, and eliminate challenges to effective labour inspections, such as measures that compel labour inspectors to conduct immigration enforcement activity;

(c) Consider systemic collection of data as a means by which victims of contemporary forms of slavery are being identified in order to improve identification efforts;

(d) Ensure the adequacy of structures and institutions to address violations and availability of effective, fair and protective mechanisms and complaints procedures; allocate financial and human resources to ensure the effective functioning of the judicial system;

(e) Provide training to law enforcement authorities on legislation prohibiting contemporary forms of slavery to ensure that they respond to the cases brought to their attention efficiently and effectively; ensure that institutional training is reinforced with performance targets;

(f) Train police, prosecutors and judicial authorities in the handling of victims of contemporary forms of slavery, especially on how to create a safe, supportive, and child-sensitive and gender-sensitive environment for victims to ensure they can access justice;

(g) Take adequate corrective measures to ensure that officials who have failed to implement the law properly or have obstructed its implementation are disciplined;

(h) Take all steps necessary to eliminate all forms of corruption in the justice system that could impede the fulfilment of the right to access to justice and remedy;

(i) Take the measures necessary to ensure the protection of victims as well as family members and witnesses, including protection from intimidation and retaliation for exercising their rights under legislation criminalizing contemporary forms of slavery or for cooperating with legal authorities;

(j) Provide protection measures to victims of contemporary forms of slavery that are not conditional on the victim's willingness to cooperate in criminal and other proceedings;

(k) Ensure that persons subjected to contemporary forms of slavery are informed, in a language they understand, of their rights, relevant laws and regulations, available complaint mechanisms and legal remedies; officials who have direct contact with victims of contemporary forms of slavery should be trained to provide this information to them;

(l) Ensure that victims of contemporary forms of slavery have access to competent legal advice and assistance and that the necessary resources are allocated to provide high-quality legal aid;

(m) Ensure that all victims of contemporary forms of slavery, both nationals and non-nationals, can pursue appropriate administrative, civil and criminal remedies, irrespective of their legal status;

(n) Take the measures necessary to ensure that non-nationals victims contemporary forms of slavery are able to remain in a country to pursue legal remedies;

(o) Take measures to protect victims of contemporary forms of slavery, including, in particular for migrant workers, the provision of a reflection and recovery period in order to allow the victim to take an informed decision relating to protective measures and participation in legal proceedings;

(p) **Ensure that victims of contemporary forms of slavery are not detained, prosecuted or punished for crimes they have committed as a result of being subjected to such practices; develop guidance for police officers, prosecutors and judges on the implementation of the "non-punishment provision";**

(q) **Ensure that information about the number of successful convictions and sentences passed are published on a regular basis;**

(r) **A compensation fund should be available for victims of contemporary forms of slavery to ensure they are able to successfully seek compensation against perpetrators in the absence of a criminal prosecution.**

65. **Regarding barriers in the context of global supply chains, the Special Rapporteur recommends that States:**

(a) **Take all actions necessary to ensure the full and effective implementation of the Guiding Principles on Business and Human Rights, including the third pillar on remedy;**

(b) **Consider elaborating an international legally binding instrument to regulate, under international human rights law, the activities of transnational corporations and other business enterprises;**

(c) **Provide oversight of all non-State grievance mechanisms, ensuring that they respect due process standards and uphold the rights of victims to have access to justice and remedy as established in international law.**

C. Recommendations to other stakeholders

66. **United Nations agencies should support Member States, civil society organizations and other stakeholders to ensure the right to have access to justice, including through the development of relevant programmes by country teams and technical support to countries in developing robust legislation and policies.**

67. **Business stakeholders should take all steps necessary to ensure full compliance with the Guiding Principles, including the third pillar on remedy.**

68. **Business stakeholders should refrain from the use of private grievance mechanisms that violate the rights of victims of contemporary slavery to justice and remedy.**

United Nations A/HRC/36/44

General Assembly

Distr.: General
26 July 2017

Original: English

Human Rights Council
Thirty-sixth session
11-29 September 2017
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy, prepared pursuant to Council resolutions 27/21 and 30/2. In the report, the Special Rapporteur lists the key activities that he undertook between July 2016 and June 2017. He then focuses on the issues of remedies and redress for victims of unilateral coercive measures, on the basis of a review, assessment and evaluation of the various mechanisms available to victims. Finally, he recommends steps to be taken to reinforce or create avenues for remedies.

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Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights*

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I. Introduction

1. The present report is submitted by the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy, pursuant to Human Rights Council resolutions 27/21, 30/2 and 34/13.

2. The General Assembly, in its resolution 70/151, and the Human Rights Council, in its resolution 30/2, requested the Special Rapporteur to focus on the negative impact of unilateral coercive measures on the enjoyment of human rights of victims and to address the issues of remedies and redress with a view to promoting accountability and reparation in his next reports to the two bodies.

3. Pursuant to these requests, the Special Rapporteur, in his report to the General Assembly at its seventy-first session (A/71/287), focused on issues of remedies and redress for victims of unilateral coercive measures. The report included a review of conceptual aspects of the remedies for violations of human rights caused by unilateral coercive measures in general international law, international human rights law and international humanitarian law. The report was drafted in parallel with, and intended to be read in conjunction with, the report that the Special Rapporteur had earlier submitted to the Human Rights Council (A/HRC/33/48), which presented a preliminary review and evaluation of the various mechanisms actually or potentially available to States and to individuals affected by unilateral coercive measures to enable them to seek remedy and redress.

4. In his report to the General Assembly at its seventieth session (see A/70/345, para. 56 (a)), the Special Rapporteur proposed the creation of a register of unilateral coercive measures likely to have a human rights impact, to be maintained and updated by the Secretary-General. In his previous report to the Human Rights Council and his report submitted to the General Assembly at its seventy-first session (A/71/287), he called upon the two bodies to restate in a solemn manner, through a declaration, the right of victims to an effective remedy, including appropriate and effective financial compensation, in all situations where their human rights were adversely impacted by unilateral coercive measures.

5. The General Assembly, in its resolution 71/193, took note with interest of the proposals contained in the report of the Special Rapporteur and requested him to include in his report to the General Assembly at its seventy-second session more information on the discussion of his proposals at the Human Rights Council.

6. The Human Rights Council, in its resolution 34/13, requested the Special Rapporteur to continue to pay special attention and identify immediate solutions to the negative impact of unilateral coercive measures on the enjoyment of human rights of victims, and to focus, in his next reports to the Human Rights Council and to the General Assembly, on the resources and compensation necessary to promote accountability and reparations for victims.

7. In the present report, therefore, the Special Rapporteur focuses on the identification of possible mechanisms to ensure the availability of efficient remedies and redress for victims of unilateral coercive measures. The report begins by summarizing the status of his proposals regarding the establishment of a United Nations register of unilateral sanctions likely to have a human rights impact and the adoption of a declaration on unilateral coercive measures and the rule of law. Then, in the light of the findings of his previous report (see A/HRC/33/48, paras. 48-50 and 74), he elaborates on the possible features of a compensation commission that might be established to provide remedies for victims of unilateral coercive measures. He also addresses certain relevant issues raised by the practice of extraterritorial sanctions, as well as issues regarding the extraterritorial character of human rights obligations of States. The present report will be supplemented by the report on the same topic that the Special Rapporteur will submit to the General Assembly at its seventy-second session.

8. The Special Rapporteur welcomes any comments, information and suggestions that governments, non-governmental organizations and any other interested parties may provide

on remedies and redress in relation to the negative impact of unilateral coercive measures on human rights.

II. Activities of the Special Rapporteur

9. Between 1 July 2016 and 30 June 2017, the Special Rapporteur issued seven press releases, three of which were issued jointly with other special procedure mandate holders.

10. On 4 April 2016, the Special Rapporteur participated in the eighteenth session of the Working Group on the Right to Development, where he engaged in an interactive dialogue with experts on the implementation and realization of the right to development.

11. On 12 October, the Special Rapporteur presented a statement at the International Seminar on the Right to Development, organized by the Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation in Abu Dhabi. In the statement he reflected on the thirtieth anniversary of the Declaration on the Right to Development and considered ways of using that right to promote effective and sustainable development.

12. On 16 October, the Special Rapporteur presented his report (A/71/287) to the General Assembly. In the report the Special Rapporteur reviewed the conceptual aspects of remedies for violations of human rights caused by unilateral coercive measures in international law.

13. The Special Rapporteur carried out an official country visit to the Russian Federation from 24 to 28 April 2017 (see A/HRC/36/44/Add.1). He thanks the authorities of the Russian Federation for their engagement with his mandate. At the end of his visit, the Special Rapporteur issued a press statement conveying his preliminary observations and recommendations, observing that sanctions might have led to economic losses to the European Union and the Russian Federation totalling $155 billion, without apparent benefit. He noted that targeted sanctions against individuals lack any form of due process, which violated the rule of law.

14. The Special Rapporteur carried out an official visit to the institutions of the European Union from 19 to 22 June 2017 (see A/HRC/36/44/Add.2). He thanks the authorities of the European Union for their engagement with his mandate. At the end of his visit, the Special Rapporteur issued a press statement conveying his preliminary observations and recommendations.

III. Follow-up to previous recommendations of the Special Rapporteur

15. Since his appointment, the Special Rapporteur has submitted annual reports to the Human Rights Council and the General Assembly, containing observations and recommendations relating to his mandate.

16. The Special Rapporteur reiterates all his previous recommendations, in particular the recommendation that a consolidated central register should be set up at the level of the United Nations to recapitulate the list of all unilateral coercive measures in force. This register should be kept according to the standards currently applied to Security Council sanctions and made public. Targeted or sender/source States or groups of States should be invited to notify the Council of unilateral coercive measures in force at their initiative and of the evolution of those measures. Such a mechanism could draw on the model of the United Nations Register of Conventional Arms, which includes data on international arms transfers as well as information provided by Member States on military holdings, procurement through national production and relevant policies.

17. The Special Rapporteur has duly noted the concerns expressed by the Human Rights Council in its resolution 34/13, where it underlined the necessity of examining the wide range of impact of unilateral coercive measures on international humanitarian and human rights law, and on the economy, peace, security and social fabric of States, as well as the

need to monitor human rights violations associated with unilateral coercive measures and to promote accountability. In the same resolution, the Council recognized the importance of the quantitative and qualitative documentation of any such negative impact in the context of ensuring the accountability of those responsible for human rights violations resulting from the application of unilateral coercive measures against any State. The Special Rapporteur believes that the establishment of a consolidated register of unilateral coercive measures will be required to ensure the availability of such documentation. The register must be supplied with the necessary information and must function effectively in order to evaluate accurately the negative impact of unilateral sanctions and hence to ensure accountability and redress for victims. As the Special Rapporteur has already pointed out (see A/71/287, para. 39), measures aiming to ensure transparency in sanctions regimes that are already in force are a prerequisite for the implementation of the right to a remedy for adverse consequences for human rights of unilateral coercive measures. The Special Rapporteur welcomes the support for his proposal for a central register expressed by some participants at the thirty-third session of the Human Rights Council.[1]

18. The Special Rapporteur also wishes to reiterate his call to the Human Rights Council and the General Assembly to restate in a declaration the right of victims to an effective remedy, including appropriate and effective financial compensation, in all situations where their human rights are adversely impacted by unilateral measures. While such a right is arguably acknowledged in theory and principle as a necessary component of human rights, it has not, to date, been recognized or affirmed in a specific manner, and it is frequently ignored or set aside in practice. Unlike victims of armed conflict, for whom the right to a remedy and the conditions of its realization have been affirmed and widely recognized at the international level,[2] victims of unilateral sanctions all too often remain in legal limbo.

19. The Special Rapporteur worked further on his proposals for a draft declaration and a register of unilateral sanctions, and held a meeting of a high-level expert working group on 3 June 2017 to review, assess and refine the two proposals and agree on the language to be put before the Human Rights Council. The outcome document of the meeting is annexed to the present report.

IV. Extraterritoriality and international sanctions

20. The issue of extraterritoriality in relation to international sanctions raises two separate, albeit interrelated questions: whether the extraterritorial reach of sanctions is to be deemed admissible (or lawful) under international law, including international human rights law, and whether States (or international organizations) are subject to extraterritorial obligations under human rights instruments in relation to the application and effects of sanctions.

A. Extraterritorial sanctions under international law

1. General international law

21. For over two decades, the Government of the United States of America has commonly applied the country's domestic sanctions law to foreign persons and institutions.[3] For example, it has sanctioned foreign financial institutions for having engaged in financial transactions initiated outside the United States that do not comply with

[1] See, for instance, the comments by Tehmina Janjua, Permanent Representative of Pakistan, on behalf of the Organization of Islamic Cooperation (13 September 2016).

[2] See, for instance, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[3] M. Rathbone, P. Jeydel and A. Lentz, "Sanctions, sanctions everywhere: forging a path through complex transnational sanctions laws", *Georgetown Journal of International Law*, vol. 44 (2012-13), pp. 1055-1126.

the country's sanctions regimes, and has tried to regulate foreign exchange transactions.[5] It has been recently reported that the Government of the United Kingdom of Great Britain and Northern Ireland is in the process of introducing new legislation displaying the same features, albeit in a more limited form.[6] By contrast, the European Union is understood to refrain generally from applying any restrictive measures having extraterritorial reach.[7] The European Union adopted in 1996 instruments of European Union law which are still in force, designed to counter the purported extraterritorial effects of United States sanctions regimes, which the European Union sees as unlawful. The provisions state: "A third country has enacted certain laws, regulations, and other legislative instruments which purport to regulate activities of natural and legal persons under the jurisdiction of the [European Union] Member State; ... by their extra-territorial application such laws, regulations and other legislative instruments violate international law".[8]

22. There is a general understanding that extraterritorial sanctions disregard commonly accepted rules governing the jurisdiction of States under international law.[9] The concept of State jurisdiction describes the limits of the legal competence of a State to make, apply, and enforce rules of conduct upon persons. It concerns essentially the extent of each State's right to regulate conduct or the consequences of events.[10] In other words, jurisdiction concerns the power of the State under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of State sovereignty, equality of States and non-interference in domestic affairs.[11]

23. International law relating to jurisdiction generally relies on a distinction between prescriptive jurisdiction (i.e. the law-making capacity) and enforcement jurisdiction (i.e. the capacity to ensure compliance with the law). Prescriptive jurisdiction must be based upon certain recognized criteria to avoid conflicts of sovereignty among States. These criteria are generally described as follows:

- The territoriality principle, according to which a State may pass laws governing people and property in its own territory
- The nationality principle, according to which a State may regulate the conduct of its citizens in any part of the world
- The effects doctrine, according to which a State may regulate conduct that has a direct, foreseeable and substantial effect within its territory, even though the acts giving rise to the effects are undertaken abroad; this principle can be seen as an extension of the territoriality principle
- The passive personality principle, according to which a State has jurisdiction over conduct directed against the welfare of its own citizens

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[5] See, for instance, M. Coumard, "Les lois Helms-Burton et d'Amato-Kennedy, interdiction de commercer avec et d'investir dans certains pays", *Annuaire français de droit international*, vol. 42 (1996), pp. 33-61.

[6] See United Kingdom Foreign and Commonwealth Office and HM Treasury Department for International Trade, "Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions", presented to Parliament in April 2017, p. 16. According to this document, a "UK nexus" (enabling the Government to enforce sanctions) might be created by such things as a sterling transaction overseas that clears in the United Kingdom, action by a local subsidiary of a United Kingdom parent company (depending on the structure of governance), action taking place overseas but directed from within the United Kingdom, or financial products or insurance bought on United Kingdom markets but held or used overseas.

[7] See, for instance, J. Scott, "Extraterritoriality and territorial extension in EU law", *American Journal of Comparative Law*, vol. 62 (2014), pp. 87-126; J. Scott, "The new EU 'extraterritoriality' ", *Common Market Law Review*, vol. 51 (2014), pp. 1343-1380.

[8] Council of the European Union, "Council Regulation (EC) No. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom", *Official Journal of the European Union*, L 309 (29 November 1996), preamble.

[9] See M. Coumard, "Les lois Helms-Burton et d'Amato-Kennedy", pp. 36-50.

[10] R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (1992), p. 456.

[11] M.N. Shaw, *International Law* (Cambridge, Cambridge University Press, 2014), p. 469.

- The protective principle, according to which a State may regulate conduct of foreigners that could prejudice its most vital interests, however, while this concept is well established in international law, uncertainties remain as to its extent and the acts it covers.

- The universality principle, according to which all States may exercise jurisdiction over certain criminal activities, notably piracy and slavery, regardless of the place of perpetration and the nationality of victims or offenders.

24. Against this background, it is generally assumed that extraterritorial sanctions are unlawful.[11] The reason for this is basically that most extraterritorial sanctions cannot invoke any of the above-mentioned criteria.[12] In particular, the effects doctrine, sometimes invoked by the United States as a justification for the implementation of extraterritorial measures, could be potentially legally warranted in only a very limited number of cases, given the cumulative requirements that the said effects (of the situation that has triggered the decision to impose sanctions) on the territory of the targeting State be direct, foreseeable and substantial. It also appears that extraterritorial sanctions cannot generally be justified as legitimate countermeasures under the law of State responsibility.

25. A number of negative reactions to the practice of extraterritorial sanctions have been expressed over time by United Nations organs, other international organizations and individual States, and are reflected in the academic literature. The assumption that extraterritorial sanctions are unlawful is shared by a vast number of countries.[13] Since 1992, the General Assembly has annually voiced its condemnation of the extraterritorial reach of the embargo imposed on Cuba by the United States.[14] For its part, in 1996, the European Union adopted a so-called blocking statute, under which European Union companies are prohibited from complying with extraterritorial sanctions imposed by the United States.[15] The European Union has also expressed its position against extraterritorial sanctions in its own guidelines on "restrictive measures" as follows:

> "The EU will refrain from adopting legislative instruments having extra-territorial application in breach of international law. The EU has condemned the extra-territorial application of third country's legislation imposing restrictive measures which purports to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Union, as being in violation of international law".[16]

26. A comprehensive study aimed at evaluating the practice of extraterritorial unilateral sanctions under international law would far exceed the scope of the present report. This remains a task for the future, preferably to be undertaken by the International Law Commission. Such a study would require a comprehensive enquiry into the existence, the content and the precise current legal status of any rule prohibiting recourse to extraterritorial sanctions in present-day international law. The study would also have to encapsulate all known critical reactions to extraterritorial sanctions at the United Nations level, but also those of regional organizations or individual States or those voiced in the

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[11] See C. Bismuthm, "Practice makes perfect, eventually? Unilateral State sanctions and the extraterritorial effects of national legislation", in N. Ronzitti, ed., *Coercive Diplomacy, Sanctions and International Law* (Leiden/Boston, Brill Nijhoff, 2016), pp. 103-128; and S. Emmenegger, "Extraterritorial economic sanctions and their foundation in international law", *Arizona Journal of International & Comparative Law*, vol. 33 (2016), pp. 833-860.

[12] See M. Cremona, "Les lois Helms-Burton et d'Amato-Kennedy", pp. 70-90.

[13] In addition to the various resolutions of the General Assembly and the Human Rights Council condemning the use of extraterritorial sanctions, the countries of the Non-Aligned Movement have firmly rejected this practice (see, for instance, Asian-African Legal Consultative Organization resolution RES/51/S 6). See also Council of the European Union, "Council Regulation (EC) No. 2271/96", referred to above. Canada, Japan and other countries appear to share the same views.

[14] See General Assembly resolution 47/19 and subsequent resolutions.

[15] Council of the European Union, "Council Regulation (EC) No. 2271/96".

[16] Council of the European Union, "Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy" (15 June 2012), para. 92.

form of protests, domestic blocking legislation, non-recognition by domestic courts etc. The study would also have to assess the potential implications of the use of extraterritorial sanctions in terms of the law of international responsibility. It is worth mentioning in that respect that, in 2006, the International Law Commission examined a preliminary Secretariat report on extraterritorial jurisdiction, which could form the basis for long-term work on the codific...ion of international law on the matter.[17] That proposal could (or should) be revived in some form.

2. International human rights law

27. The adverse effects of international coercive measures in general on the enjoyment of human rights of targeted populations have been widely documented. The question arises whether extraterritorial sanctions display specific features (i.e. whether they are likely to have specific adverse consequences on human rights) that can be distinguished from those arising from the use of sanctions in general. It is submitted that such specific effects flow from extraterritorial sanctions, to the extent that they affect the ability of the targeted country (and its population), as well as that of third countries not involved in the dispute between source and target countries, to interact with the global business and financial community. They are likely, per se, to have specific, additional adverse consequences on human rights, including the right to development. Most international businesses, while legally not subject to the jurisdiction of the targeting State, will in practice be unwilling to entertain any economic relations with parties in the targeted State that might lead to their "violating" the provisions of the extraterritorial sanctions regime — and thus might jeopardize their ability to pursue their own business activities in the targeting State. This has led to the damaging practice of over-compliance by trading partners of targeted countries. The result is a de facto blockade of the target State, voluntarily complied with by economic actors that are not even legally subject to the jurisdiction of the targeting State. The distinct additional impact of extraterritorial sanctions may also be related to their effects on the targeted State's ability to gain access to international financial institutions, foreign financial markets and international aid.

28. As an example, the impact of the extraterritorial sanctions imposed on Cuba by the United States (before their lifting, de jure rather than de facto, in 2016) on the country's ability to conduct commerce with the outside world and access international financial markets has been described as amounting de facto to a global embargo. The Helms-Burton Act had the effect of blocking access by Cuba to global financial institutions, as well as to access to the SWIFT financial messaging system, which had severe effects in the context of the economic crisis of Cuba.[18]

29. Extraterritorial application of unilateral sanctions may also have an adverse impact on the enjoyment of human rights in third countries, which are not targeted directly, but are prevented by the operation of the (extraterritorial) foreign law from entertaining economic relations with the target country. It has long been recognized that economic sanctions enacted against States by the Security Council may cause unintended adverse consequences for third parties, such as trade partners. Article 50 of the Charter of the United Nations provides that, if preventive or enforcement measures against any State are taken by the Security Council, any other State that finds itself confronted with special economic problems arising from the carrying out of those measures has the right to consult the Security Council with regard to a solution of those problems.

30. It is fair to assume that the same adverse effects may derive from the application of unilateral (extraterritorial) sanctions, but in that situation no rule comparable to Article 50 of the Charter seems to apply.

31. Regulation No. 2271/96 of the Council of the European Union (the "blocking statute") was intended to address and remedy the adverse effects of foreign extraterritorial sanctions on economic enterprises of the European Union engaging in international trade

[17] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10).

[18] C.J. Gordon, "The U.S. Embargo against Cuba and the Diplomatic Challenges to Extraterritoriality", *Fletcher Forum of World Affairs*, vol. 36 (2012), pp. 69-70.

and/or the movement of capital and related commercial activities between the (then) European Community and (targeted) third countries.[19] The protection against the extraterritorial application of sanctions lies in particular in the mandatory non-recognition in the European Union of their legal effects.[20] It is to be noted that, while economic operators in the European Union are generally prohibited from complying in any way with the extraterritorial sanctions,[21] they can nevertheless seek authorization to comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community.[22] Interestingly, the instrument also provides in detail for remedies in favour of affected persons. European Union enterprises engaged in trade or economic relations with a target country are to be entitled to recover any damages, including legal costs, caused to that person by the application of the extraterritorial laws. Such recovery may be obtained from the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary. The recovery could take the form of seizure and sale of assets held by those persons, entities, persons acting on their behalf or intermediaries within the European Union, including shares held in a legal person incorporated within the European Union.[23]

32. It is probably fair to note that, although the blocking statute appears at first sight to be a powerful tool enabling the European Union to protect itself against the effects of extraterritorial sanctions, it has unfortunately failed in the past to protect some European Union companies (including banks), which incurred huge penalties from the United States Department of the Treasury on the grounds of non-compliance with United States sanctions. It is disturbing to observe that the European Union and its member States have generally refrained from enforcing the provisions of the blocking statute or from exercising any form of diplomatic protection in favour of their nationals affected by the extraterritorial effects of foreign sanctions. Further, it is noteworthy that the application of this instrument has not been extended by the European Union to cover the most recent United States sanctions regimes having extraterritorial reach.

B. Extraterritorial obligations of States in relation to sanctions

33. The question is still being debated whether the obligations of States under the International Covenant on Economic, Social and Cultural Rights extend extraterritorially "to the point at which a State imposing sanctions might be held responsible for any consequential deprivation (of the right to food or health care, for example), even if the sanctioning State exercised no formal jurisdiction or control over the population concerned".[24] However, the Special Rapporteur wishes to emphasize that there are strong and convergent legal arguments pointing to the existence of extraterritorial State obligations under the Covenant that may cover situations of imposition of international sanctions. As it has been observed, "it is now widely agreed that human rights treaties may, in principle, impose on States parties obligations not only when they adopt measures applicable on their own territory, but also extraterritorial obligations, which may include positive obligations going insofar as the State can influence situations located abroad".[25] It seems difficult to deny that sanctions come within the category of situations where States can influence situations located abroad.[26]

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[19] Council Regulation (EC) No. 2271/96, art. 1.

[20] Ibid., art. 4.

[21] Ibid., art. 5.

[22] Ibid., art. 5.

[23] Ibid., art. 6.

[24] M. Craven, "The violence of dispossession: extra-territoriality and economic, social, and cultural rights", in M. Baderin and R. McCorquodale, eds., *Economic, Social, and Cultural Rights in Action* (Oxford, Oxford University Press, 2007), p. 71.

[25] O. De Schutter, "A human rights approach to trade and investment policies", November 2008, para. 3.2. Available from www.iatp.org/sites/default/files/451_2_104504.pdf.

[26] Ibid.

34. Firstly, the International Covenant on Economic, Social and Cultural Rights has no territorial or jurisdictional limitations on the scope of its application.[27] Whereas article 2 (1) of the International Covenant on Civil and Political Rights sets out the obligation of States parties to respect and ensure the rights of all individuals within its territory and subject to its jurisdiction, the equivalent provision in article 2 (1) of the International Covenant on Economic, Social and Cultural Rights avoids any reference to "jurisdiction" or "territory". Furthermore, the latter, using language that has no equivalent in the former, imposes an obligation upon all States to take steps, individually and through international assistance and cooperation, with a view to achieving the full realization of the recognized rights on a progressive basis.[28] This clearly implies that States parties assume certain obligations of an external or international nature.[29] Thus the International Covenant on Economic, Social and Cultural Rights can be deemed as setting forth certain extraterritorial obligations for State parties in respect of individuals in third States.[30]

35. Secondly, the concept of "jurisdiction", which is the criterion (and an alternative to "territory") for the applicability of the legal human rights obligations of States, has been extended over time to address satisfactorily situations where a restrictive application of the territorial or jurisdictional requirements in the relevant treaty would have prevented its application. Thus, jurisdiction has been established with respect to "occupied" territory[31] and to territory over which a State assumes some form of "effective control".[32] Taking these findings as a starting point, and applying these to situations where the measures complained of (i.e. sanctions) have extraterritorial effects by their very nature, it may be reasonably argued that a State imposing sanctions should incur liability for violations of human rights even if it does not exercise formal "jurisdiction" or "control" over the population or the territory targeted. This is all the more so since, as previously mentioned, the International Covenant on Economic, Social and Cultural Rights does not contain territorial or jurisdictional limitations.

36. In addition, an argument can be made that such position would be consonant with the rule of customary international law which prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained

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[27] M. Sepulveda and C. Courtis, "Are extra-territorial obligations reviewable under the optional protocol to the ICESCR?", *Nordic Journal of Human Rights*, vol. 27 (2009), p. 55; see also M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford, Oxford University Press, 2011), p. 17.

[28] The reference to international cooperation is further reiterated in arts. 11 (2) and 15 (4) of the International Covenant on Economic, Social and Cultural Rights. Art. 23 states that international action for the achievement of the recognized rights should include such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study.

[29] M. Craven, "The violence of dispossession", p. 71.

[30] See, for instance, F. Coomans, "The extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights in the work of the United Nations Committee on Economic, Social and Cultural Rights", *Human Rights Law Review*, vol. 11 (2011), pp. 1-35.

[31] See Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2009); F. Coomans, "The extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights", p. 6.

[32] See, for example, International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 112, referring to the findings of the Committee on Economic, Social and Cultural Rights that the obligations of Israel under the Covenant applied to all territories and populations under its effective control (see E/C.12/1/Add.90, paras. 15 and 31). See also European Court of Human Rights, *Loizidou v. Turkey* (application No. 15318/89), judgment on preliminary objections of 23 March 1995, para. 62: "The responsibility of a Contracting Party may also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective control of an area outside its national territory".

particular relevance in international environmental law[33] and may be deemed relevant to the field of protection of human rights.[34]

37. Further, such arguments in favour of extraterritorial obligations under human rights treaties are fully consistent with the actual practice of the Committee on Economic, Social and Cultural Rights. In its general comment No. 8 (1997), on the relationship between economic sanctions and respect for economic, social and cultural rights, the Committee set out certain obligations borne by parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States. Among these obligations flowing from the recognition of economic, social and cultural human rights, the Committee identified the obligation to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.

38. In the same general comment, the Committee expressed the view that, when an external party took upon itself even partial responsibility for the situation within a country, it also unavoidably assumed a responsibility to do all within its power to protect the economic, social and cultural rights of the affected population. The Special Rapporteur believes that there lies the crux of the matter: notwithstanding the responsibility of the targeted State to do its utmost to protect its own population, a State imposing sanctions, insofar as it practically assumes even partial responsibility for the situation within the targeted country, is also ipso facto under an obligation to protect the economic, social and cultural rights of the affected population.

39. Other findings of the Committee point in the same direction. In its general comment No. 14 (2000) on the right to the highest attainable standard of health, the Committee emphasized that States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. This clear position by the Committee, it has been noted, may be interpreted as an implicit recognition of extraterritorial human rights obligations in the area of economic, social and cultural rights.[35]

40. It should be added that, as a matter of principle, there is no apparent reason to exclude the applicability of the general principles of State responsibility (and/or the responsibility of international organizations, as the case may be) in cases of damage caused to a third country by the application of sanctions imposed by source States (or international organizations). The basic principle enunciated in article 1 of the articles on responsibility of States for internationally wrongful acts (comprising text adopted by the International Law Commission in 2001), according to which every internationally wrongful act of a State entails the international responsibility of that State, should be deemed to apply equally to wrongful acts of a State entailing damages to human rights of persons or populations of other countries. In relation to the international responsibility of a State for unlawful acts, it has even been observed that a State is under a duty to control the activities of private persons within its State territory, and that the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another State.[36] Arguably, the same duty shall apply a fortiori to unilateral sanctions that are directly attributable to the

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[33] As noted by the Committee on Economic, Social and Cultural Rights in its general comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.

[34] See N. Vennemann, "Application of international human rights conventions to transboundary State acts", in R. M. Bratspies and R.A. Miller, eds., *Transboundary Harm in International Law. Lessons from the* Trail Smelter *Arbitration* (Cambridge, Cambridge University Press, 2006), pp. 295-307; De Schutter and others, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol. 34 (2012), p. 1084; L. Bartels, "The EU's human rights obligations in relation to policies with extraterritorial effects", *European Journal of International Law*, vol. 25 (2014), pp. 1081-1083.

[35] F. Coomans, "The extraterritorial scope of the International Covenant on Economic, Social and Cultural Rights", p. 12.

[36] I. Brownlie, *System of the Law of Nations. State Responsibility* (Oxford, Clarendon Press, 1983), p. 165.

State. Unlawful assertion of jurisdiction through extraterritorial application of domestic (sanctions) measures, to the extent that it results in adverse effects (economic or otherwise) on third countries, should also entail the international responsibility of the targeting State.

V. Options for the establishment of specialized compensation commissions for victims of unilateral coercive measures

41. The Special Rapporteur has previously mentioned the possibility of establishing a compensation commission for the purpose of providing effective compensation to victims of unilateral coercive measures (see A/HRC/33/48, paras. 48-50 and 74). It is submitted that this option would be the clearest way to ensure general availability of remedies for victims since, to date, few international forums are available to victims, whether States, individuals or entities, as a matter of fact and law, and there remains a measure of controversy as to the competence of United Nations human rights bodies to address claims based on the effects of imposition of unilateral coercive measures.

42. It is submitted that such a compensation commission could draw on the model of past similar mechanisms, which were most often created to address the need to provide for remedies for victims of armed conflict. In particular, the precedent of the United Nations Compensation Commission should be considered. The Commission was established as a subsidiary organ of the Security Council by resolution 687 (1991), with a mandate to review, decide and pay the claims for which Iraq was liable as a result of its unlawful invasion of Kuwait.[37] Despite criticism of the Commission, related mainly to the politicized circumstances of its creation, the lack of application of the rule of law in the adjudication of claims and the origin of the resources allocated to the victims (which were diverted from Iraqi oil export revenue), lessons may be drawn from the functioning of the Commission, and some of its features are of direct relevance to the right of victims to seek reparations for violations of human rights.

43. An enquiry may also need to be conducted on the relevance of other compensation commissions, whatever their title. A number of such mechanisms were set up in the past, whether by agreement between the States concerned or by decision of the Security Council.

44. Such a compensation commission could be set up under the Security Council or, alternatively, be established by means of a multilateral convention negotiated under the auspices of the United Nations.

45. An important issue is that of the resources and financing of the compensation commission. States which have imposed unilateral coercive measures on other States could be called upon to contribute financially to it. It is also submitted that one pragmatic possibility for the financing of the compensation commission would be to provide for the diversion of all or part of the financial contributions of the targeted State to multilateral financial institutions and its subsequent allocation to the compensation commission, without any negative consequence for the targeted country. The latter would therefore retain its full membership rights, including voting rights, in the multilateral financial institution(s) concerned, as if the contributions had not been diverted.

46. The institutional features and modalities of functioning of the compensation commission call for special attention. A preliminary issue to be addressed is whether it would be preferable to establish a single, all-purpose compensation commission for all existing sanctions regimes or, alternatively, several compensation commissions, each designed to provide for the reparations of damage suffered by victims of a single sanctions regime.

[37] See M. Frigessi di Rattalma and T. Treves, eds., *The United Nations Compensation Commission, A Handbook* (The Hague, Kluwer Law International, 1999); H.M. Holtzmann and E. Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford, Oxford University Press, 2007).

47. The compensation commission would need to operate according to strict rules of procedure, and should be designed so as to allow for an expedient, fair and efficient evaluation and adjudication of the claims. The following features would have to be agreed upon, in particular:

(a) The composition of the adjudicatory body of the compensation commission; the creation of one single panel or several and the modalities of designation and replacement of the members of the commission (or panels);

(b) The method of determining the amount of damages and their allocation to the victims;

(c) The establishment of a secretariat and a supervisory body;

(d) The requirements regarding the claimants and conditions of admissibility of the claims (eligibility criteria); the United Nations Compensation Commission adopted a system of consolidated claims, under which only States were entitled to submit claims on behalf of their nationals and corporations, but an alternative would be a direct right of action for victims;

(e) The applicable rules of procedure, proof and evidence;

(f) The time limits for the submission of claims;

(g) The provisions regarding an appeal or review mechanism for decisions of the commission.[38]

VI. Conclusions and recommendations

48. The Special Rapporteur is of the view that the time has come for the international community to reaffirm the principle that all persons whose enjoyment of human rights has been affected by unilateral coercive measures are entitled to an effective remedy, including appropriate and effective financial compensation. Such affirmation necessarily flows from the general principle, enshrined in the Universal Declaration of Human Rights and a number of other human rights instruments, that everyone has the right to an effective remedy for acts violating his or her fundamental rights. There is no reason why unilateral coercive measures should be exempted from this general principle, which is intended to benefit all victims of human rights violations, irrespective of the particular facts or context of such violations. It is worth recalling that, in the 2030 Agenda for Sustainable Development, States have pledged to act for the promotion of the rule of law at the national and international levels and to ensure equal access to justice for all (target 16.3 of the Sustainable Development Goals).

49. It is necessary to extend the paradigm from remediation to prevention of the adverse effects of unilateral sanctions. States should thus be called upon to take resolute steps, at an early date and in good faith, towards termination of unilateral coercive measures in force and renunciation of their use, in accordance with international law. A commitment by States to abolish unilateral sanctions and give precedence to means of peaceful settlement of international disputes and differences would be in line with their obligation under the Charter of the United Nations to settle their international disputes by peaceful means such that international peace and security and justice are not endangered, in accordance with Chapter VI of the Charter.

50. The fact that States increasingly resort to unilateral coercive measures raises some basic principles of international law which need to be reaffirmed. Assuming that there will be a transition period pending complete termination and elimination of

[38] On institutional characteristics of the Compensation Commission, see, for instance, F.E. McGovern, "Dispute system design: the United Nations Compensation Commission", *Harvard Negotiation Law Review*, vol. 14 (2009), pp. 171-193.

unilateral coercive measures, States are urged to comply during that transition period with universally accepted rules of behaviour, called for by international law and international human rights law, aiming at the mitigation of the adverse human rights impacts of unilateral sanctions. These basic principles and rules of behaviour are set out in detail in the elements for a draft declaration on unilateral coercive measures and the rule of law contained in appendix II of the annex to the present report. The rules of behaviour advocated include, inter alia, the obligation to conduct a transparent human rights assessment of coercive measures, to monitor on a regular basis the effects of implementation of the measures, to ensure effective exemptions for satisfying basic human rights and essential humanitarian needs, and to guarantee due process and the availability to victims of judicial review for obtaining remedies and redress.

51. The other proposal put forward by the Special Rapporteur, i.e. the establishment of a United Nations register of unilateral sanctions likely to have a human rights impact, is a simple, practical, viable and fair means to ensure transparency in the implementation of sanctions during the transition period. This transparency will be helpful to the Security Council, civil society organizations and the business sector. The Special Rapporteur believes that such a mechanism could be agreed and established and begin operations in the very near future.

52. The Special Rapporteur must strongly emphasize the paradoxical fact that the same countries which apply unilateral sanctions with extraterritorial reach and effects are the same ones which generally oppose the recognition of the extraterritorial character of State obligations assumed under the Covenants, in particular the International Covenant on Economic, Social and Cultural Rights. He concurs with the view of the Committee on Economic, Social and Cultural Rights that, as a matter of law and logic, the imposition of sanctions on a third country entails at least partial responsibility of the targeting State for the situation within the targeted country, which in turn implies the legal responsibility also of the targeting State to protect, extraterritorially, the human rights of the affected population, especially their fundamental economic, social and cultural rights. The Special Rapporteur therefore calls for a solemn reiteration, in the form of a declaration on unilateral coercive measures and the rule of law, of the basic principle that unilateral coercive measures involving extraterritorial application of domestic measures are unlawful under international law. He trusts that such condemnation of extraterritorial measures as unlawful reflects the understanding of most countries of the world, irrespective of their legal systems.

53. The Special Rapporteur also calls for an explicit recognition of the basic principle of the extraterritorial character of the human rights obligations of States in cases of imposition of sanctions on third countries; such action entails the legal accountability of targeting States for measures affecting negatively the enjoyment of human rights of the affected populations.

54. Finally, the Special Rapporteur wishes to reiterate that the establishment of an ad hoc compensation commission under the United Nations for victims of unilateral coercive measures is a viable option to ensure accountability and the availability of remedies and redress while gaps still remain in domestic and international mechanisms for the judicial review of unilateral sanctions.

Annex

Outcome document of the expert working group convened in Geneva on 3 June 2017

1. An expert consultation was held at the OHCHR, Palais Wilson in Geneva on 3 June 2017 to review and evaluate the initiatives put forward by the Special Rapporteur in his reports to the Human Rights Council and the General Assembly, i.e. a United Nations Register of unilateral sanctions likely to have a human rights impact and a United Nations Declaration on unilateral coercive measures and the rule of law.

2. In addition to the Special Rapporteur, Mr. Idriss Jazairy, the following experts were in attendance: Professor Mark Bossuyt (Member of the Committee on the Elimination of Racial Discrimination, Member of the Permanent Court of Arbitration in The Hague and a former judge at the Belgian Constitutional Court), Professor Alena Douhan (Associate Professor of international law, Belarusian State University, Minsk, Belarus), Mr. Hans-Jakob Schindler (Coordinator of the ISIL(Da'esh)/Al-Qaida/Taliban Monitoring Team), Ms. Catherine Marchi-Uhel (Ombudsperson, Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee), Professor Aslan Abashidze (Member of the United Nations Committee on Economic, Social and Cultural Rights, Professor at the International Law Department, Moscow State Institute of International Relations and Director of Center for Innovations in Education and Legal Research at Peoples' Friendship University of Russia), Professor Matthew Happold (Professor of Public International Law at the University of Luxembourg and a barrister at 3 Hare Court, London),Professor Antonios Tzanakopoulos (Associate Professor of Public International Law, University of Oxford) and Mr. Pierre-Emmanuel Dupont (Director, Public International Law Advisory Group) who moderated the workshop. Mr. Alfred de Zayas (Independent Expert on the promotion of a democratic and equitable international order) could not attend but submitted a statement.

3. The first session of the expert consultation was devoted to the draft Declaration on unilateral coercive measures and the rule of law. One participant first addressed the issue of the legal force of resolutions of the General Assembly, stressing that for a General Assembly resolution to have legal effects, it should have a normative character, it should receive the support or at least the absence of opposition from a large number of States, including the States particularly affected by the matter concerned, and the adoption of the resolution should be followed by a uniform and constant state practice in conformity with the behaviour prescribed in the resolution. Another participant addressed the issue of mechanisms of and remedies for human rights protection against unilateral coercive measures. Unilateral coercive measures have an impact a broad range of human rights, and their 'contributory nature' in ongoing human rights situations brought before the Human Rights Council was underlined by one participant. Possible responses to unilateral coercive measures were identified, and a distinction was made between immediate and long-term responses. Responses to measures targeting States (including Special Procedures of the Human Rights Council, United Nations fact-finding missions, [1] a United Nations compensation commission, etc.) and responses to measures directed against individuals or entities (including, but not limited to, judicial review before domestic courts of the sanctioning state, which is unfortunately subject to a range of legal and practical limitations, if available at all, in many scenarios). It was also called for a reform of the 'targeted sanctions' processes to ensure due process guarantees, that would include the mandatory and immediate opening of criminal or administrative process in parallel to inclusion in a sanctions list, and lifting of the sanctions (and financial compensation) if a person is recognized not-guilty. A participant referred to the under-utilized inter-State complaints procedure, which should be engaged and in some cases could facilitate negotiation and friendly settlement under treaty bodies (e.g. Art. 41 International Covenant

[1] *See* Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security (A/RES/46/59).

on Civil and Political Rights). It was suggested that sanctions should also be tested in the context of the Universal Periodic Review of the Human Rights Council. Another participant examined the relevance of the work of the International Law Association on Reparation for Victims of Armed Conflict, stressing that all victims of human rights violations are entitled to access to mechanism for reparations. Several participants stressed the importance of the right of access to a court, as called for by Article 6 of the European Convention on Human Rights and other instruments.

4. The second session focused on the United Nations Register of unilateral sanctions likely to have a human rights impact. The possible institutional features and practical modalities of functioning of such mechanism were extensively discussed, and participants generally agreed that such Register could possibly under certain conditions benefit from wide acceptance from the international community. The relevance of the United Nations Register of Conventional Arms as a possible precedent was examined, as well as possible guidance to be drawn from the practical operation of the Sanctions Committee and the Ombudsperson of the Security Council ISIL/Al Qaeda sanctions regime, and from the experience of the Committee on Economic, Social and Cultural Rights in relation to sanctions. Participants generally shared the view that unilateral sanctions were primarily to be reported (including information about the alleged impact on human rights of the measures) by targeted States, although reporting by targeting State was also possible. The depository of the Register would then notify the targeting state of the allegation by the targeted state of the alleged impact on human rights of the measures, and invite the targeting state to respond to the allegation and to include in the response, information on whether it has conducted an assessment of the possible inadvertent (or unintended) impact on human rights of the measures, and if so provide the result of such assessment, and whether it has taken any steps to mitigate such impact. It was also suggested that a focal point should be created by States for civil society organizations to be able to interact with their respective Government as regards possible notification of unilateral sanctions for inclusion in the Register. Also, the inclusion of a potential dispute settlement mechanism associated with the Registry was discussed, as well as the possibility that such dispute settlement mechanism be entitled to rule on reparation claims for adverse impact of sanctions on human rights.

Appendix I

Elements on the United Nations register of unilateral sanctions likely to have a human rights impact

1. It is suggested that the next General Assembly resolution on human rights and unilateral coercive measures include the following elements:

Preamble

2. Welcoming the proposal made by the Special Rapporteur of the Human Rights Council on the negative impact of unilateral coercive measures on the enjoyment of human rights, submitted pursuant to [---], and recalling the reports of the Secretary-General on [---], to establish a consolidated central register at the level of the United Nations Secretariat to recapitulate the list of all unilateral sanctions in force, and sharing the Special Rapporteur's view that the first obstacle to a global evaluation of the negative impact of unilateral sanctions on human rights is the unavailability of global and standardized updated data, and that full transparency in this regard would be helpful both to the United Nations, to private enterprises involved in international trade, and to the civil society at large,

Operative paragraphs

- [---]. Requests the Secretary-General to establish and maintain at United Nations Headquarters in New York a universal and non-discriminatory Register of unilateral sanctions, to include information on unilateral sanctions, to be reported by targeted States, or by States implementing sanctions as the case may be, in accordance with procedures including applicable standards initially comprising those set out in the annex to the present resolution and subsequently incorporating any adjustments to the standards decided upon by the General Assembly at its [---] session in the light of the recommendations of the panel referred to in paragraph below;

- [---]. Also requests the Secretary-General, with the assistance of a panel of independent experts to be nominated by him on the basis of equitable geographical representation and upon proposals by States, to elaborate the technical procedures and applicable standards for comparability of data, to make any adjustments to the annex to the present resolution necessary for the effective operation of the Register, and to prepare a report on the modalities for ensuring the universality and non-discriminatory character of the Register, to raise awareness concerning the Member States concerning the Register and its procedures, and to submit this report to the General Assembly at its [---] session;

- [---]. Calls upon all Member States to provide annually for the Register data in accordance with the procedures established by paragraph 26 above, and the annex to the present resolution;

- [---]. Decides, with a view to ensuring the universality and non-discriminatory character of the Register, to keep the operation of the Register under review, and, to this end:

(a) Invites Member States to provide the Secretary-General with their views, not later than [insert date 2 years ahead], on:

(i) The operation of the Register during its first two years;

(ii) Any identified obstacles to achieving the universality and non-discriminatory character of the Register;

(iii) Possible improvements or expansion of scope to include a monitoring function;

Register of unilateral sanctions

1. The Register of unilateral sanctions likely to have a human rights impact (the "Register") shall be established, with effect from [1 January 2018], and maintained at the Headquarters of the United Nations in New York.

2. Member States are requested to provide data for the Register, addressed to the Secretary-General, on an annual basis by [30 April] each year in respect of unilateral coercive measures implemented by them or targeting them and in force during the previous calendar year;

3. The first such registration shall take place by [30 April 2018] in respect of the calendar year [2017];

4. The data so provided shall be recorded in respect of each Member State.

5. Member States are requested to designate focal points for civil society organizations to be able to interact with their respective Government as regards unilateral sanctions;

6. Upon notification of the unilateral sanction by the targeted State or States, the Secretary-General shall seek the views of the source State or group of States and vice versa.

7. Unilateral sanctions covered are those taken by virtue of law or executive decision or under any other form by the source State or group of States.

8. The Register shall be open for public consultation.

9. In addition, the Secretary-General shall provide annually a consolidated report to the General Assembly of the data registered.

Appendix II

Elements for a draft General Assembly declaration on unilateral coercive measures and the rule of law

A. Basic principles

1. Full account should be taken of the position expressed in resolution 34/13 adopted by the Human Rights Council on 24 March 2017, which 'urged all States to refrain from imposing unilateral coercive measures, also urged the removal of such measures, as they are contrary to the Charter and norms and principles governing peaceful relations among States at all levels, and recalled that such measures prevent the full realization of economic and social development of nations while also affecting the full realization of human rights' ;

2. Unilateral coercive measures have a tendency to remain in force irrespective of the achievement of its purported objective;

3. Unilateral coercive measures involving extraterritorial application of domestic measures are unlawful under international law;

4. Unilateral coercive measures in a number of cases entail severe adverse impacts on the enjoyment of human rights of targeted populations and individuals, have often proven to be inefficient, and are most likely to entail unintended effects in the form of adverse human rights impacts on non-designated third parties;

5. Whilst targeted States have a responsibility to mitigate the adverse human rights impact of unilateral sanctions imposed by source countries, the latter are also accountable for any adverse effects on human rights occurring in target countries, even if such effects are unintended, to the extent that "when an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its powers to protect the economic, social and cultural rights of the affected population" (Committee on Economic, Social and Cultural Rights, General Comment No. 8 on the relationship between economic sanctions and respect for economic, social and cultural rights, E/C.12/1997/8, para. 13);

6. The inhabitants of a given country do not forfeit basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms of international peace and security, as affirmed by the Committee on Economic, Social and Cultural Rights in its general comment No. 8 on the relationship between economic sanctions and respect for economic, social and cultural rights (See E/C.12/1997/8, para. 16).

7. In situations where unilateral coercive measures inflict undue sufferings/have an egregious human rights impact, on the population of a targeted State, whatever legal motive is invoked, they become clearly illegal and their source countries should be called to account.

8. Such call for the removal of unilateral coercive measures applies to comprehensive measures as well as to targeted measures and to economic as well as to financial measures;

9. As a consequence, the basic principle should be that States and groups of States should commit themselves to refraining from imposing unilateral coercive measures, as well as remove such measures as are in force, and shall commit to using other means of peaceful settlement of international disputes and differences;

10. The present Declaration is without prejudice to the procedural and substantive requirements arising from the legal regime of countermeasures in the sense of the International Law Commission Draft Articles on the Responsibility of States for International Wrongful Acts;

B. Mitigation: Universally/Generally accepted rules of behaviour

11. Pending the total removal and termination of all existing unilateral coercive measures and renunciation to their use, all efforts should be made to mitigate the adverse effect of unilateral sanctions on human rights;

12. The transitional period preceding the total removal and termination of all existing unilateral coercive measures and renunciation to their use should be shortened to the greatest extent possible.

13. During the transitional period, the following universally accepted rules of behaviour shall be asserted to mitigate the adverse impacts of unilateral sanctions:

(a) The parties implementing unilateral sanctions are under an obligation to conduct a transparent hum an rights impact assessment of the measures envisaged, and to monitor on a regular basis the effects of implementation of the measures, including as regards their adverse effects on human rights;

(b) The parties implementing unilateral sanctions are under an obligation to ensure effective exemptions for satisfying basic human rights and essential humanitarian needs;

(c) There must be an end to the politicization of what was intended to be a purely technical interbank international financial transfer mechanism, whose manipulation in the form of selective exclusion is tantamount to re-introducing comprehensive sanctions on targeted countries;

(d) Mechanisms to guarantee due process, and the availability of judicial review for obtaining remedies and redress for unilateral coercive measures, should be available to:

- Impacted groups, though non-targeted (by comprehensive or sectoral sanctions), and
- Individuals and legal persons and entities targeted (by targeted sanctions).

(e) The basic components of the requirement of due process in relation to unilateral coercive measures, pending their total elimination, shall be the following:

(i) Mechanisms and procedures for judicial review of unilateral coercive measures:

- The factual and legal grounds for the measures have to be disclosed to the concerned parties;
- The availability of, and the mechanisms and procedures for, a right to appeal judicial review, should be made known to the targeted parties upon notification to the concerned parties;
- Such mechanisms and procedures should allow for a review of the substantive factual and legal grounds for the unilateral coercive measures, in accordance with international law and international humanitarian law, as well as in compliance with internationally recognized procedural standards;
- Such mechanisms and procedures should be in place and available at the same level (either domestic or international [either regional organization or the United Nations]) as the source of the unilateral coercive measures concerned; in case of unavailability of procedures for remedies at the domestic level or at the level of a group of countries imposing sanctions, the targeted countries or persons should be entitled to seek remedies by the Committee of the treaty body concerned, i.e. CESCR;
- Such mechanisms and procedures should be of a judicial nature or at least, for a transitional period, of the nature of an Ombudsperson or other quasi-judicial mechanism;

(ii) Notification of the measures to the parties concerned as soon as practicable, without affecting the effectiveness of the measures;

(iii) Time-bound limitation of the measures, and biannual monitoring and review;

(iv) Reversibility of the measures;

(v) Appropriate humanitarian exceptions;

(vi) A regular mechanism to monitor potential adverse impact and unintended consequences of these measures; and

(vii) Availability of effective compensation/reparations (including financial) when unwarranted adverse impacts on human rights have occurred.

United Nations A/HRC/36/44/Add.1

General Assembly

Distr.: General
27 July 2017

Original: English

Human Rights Council
Thirty-sixth session
11-29 September 2017
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, on his mission to the Russian Federation

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights on his official visit to the Russian Federation from 24 to 28 April 2017. The focus of his visit was to examine whether and to what extent the adoption, maintenance or implementation of unilateral coercive measures impedes the full realization of the rights set forth in the Universal Declaration of Human Rights and other international human rights instruments, in particular the right of individuals and peoples to development.

During his visit, the Special Rapporteur met with a wide range of high-ranking government officials, business people, academics and representatives of United Nations agencies and civil society.

In the report, the Special Rapporteur gives an overview of the unilateral coercive measures imposed on and by the Russian Federation and their impact on the enjoyment of human rights, then reviews the options to address the related challenges. On that basis, the Special Rapporteur addresses his recommendations to the Russian Federation, source countries, the United Nations system and other stakeholders. He proposes a step-by-step approach to removing unilateral coercive measures, starting with those with the most severe impact on the enjoyment of human rights. In the meantime, he advocates the resort to quiet diplomacy to facilitate channels of communications between source and target countries to broaden areas of agreement in keeping with the objective self-interest of the former and of the latter.

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Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, on his mission to the Russian Federation*

I. Introduction

1. The Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy, undertook an official visit to the Russian Federation from 24 to 28 April 2017. The aim of the visit was to assess the negative impact that unilateral coercive measures imposed by States or groups of States have on the people living in the Russian Federation.

2. During his visit, the Special Rapporteur met with the Deputy Minister for Foreign Affairs, the Deputy Minister for Labour and Social Protection, the Deputy Finance Minister, the Deputy Minister for Energy, the Chair of the Council of the Federation Committee on Constitutional Legislation and State-Building, and the High Commissioner for Human Rights in the Russian Federation. He also met with senior officials from the Department of Humanitarian Cooperation and Human Rights, the Department of Economic Cooperation of the Ministry of Foreign Affairs, the Ministry of Economic Development, the Federal Service for State Statistics and the Civic Chamber, and regional representatives.

3. The Special Rapporteur held consultations with the Vice-President of the Russian Union of Industrialists and Entrepreneurs, the Vice-President of the Chamber of Commerce and Industry and the First Vice-Chair of the Bank for Development and Foreign Economic Affairs. He also met with representatives of civil society organizations, experts and academics.

4. The Special Rapporteur met with representatives of the United Nations in Moscow. In addition, he consulted with different diplomatic representatives from the Non-Aligned Movement. Unfortunately, despite his requests, he was not able to meet with representatives of the United States of America, the European Union and several European countries. Nonetheless, the information included in the present report regarding unilateral coercive measures taken by individual States and the European Union against the Russian Federation has been shared for factual correction with the respective permanent missions to the United Nations Office at Geneva, which provided some comments and observations on 17 July 2017.

5. The Special Rapporteur expresses his gratitude to the Government of the Russian Federation for the invitation and support provided throughout the visit. He thanks the United Nations High staff in Moscow for their invaluable cooperation and assistance.

6. The Russian Federation invited the Special Rapporteur to visit different regions in the country, as well as the Autonomous Republic of Crimea and the city of Sevastopol (hereinafter "Crimea").[1] The Special Rapporteur declined the invitation to visit Crimea (and other regions), noting that, as an independent expert mandated by the Human Rights Council, he was required to perform his official functions in accordance with the Charter of the United Nations, which includes the principles of sovereignty and non-intervention, and in observance of General Assembly resolutions 68/262 and 71/205.

7. Any reference to Crimea in the present report should be read in the light of General Assembly resolutions 68/262 and 71/205.

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* Circulated in the language of submission and in Russian only.

[1] Definition taken from General Assembly resolution 71/205.

II. Background

8. In the context of the situation in south-eastern regions of Ukraine and relations between the Russian Federation and Ukraine, some three dozen countries have decided to impose unilateral coercive measures on the Russian Federation. These measures include: travel restrictions and the freezing of funds and economic resources of individuals; the blocking of property; sectoral sanctions against certain entities operating in sectors of the Russian economy, including an investment ban and a prohibition on the exportation or importation of certain goods and technology; and limitations on financial transactions.

9. The Russian Federation has responded with similar measures against a number of countries, including a ban on food imports from Australia, Canada, Norway, the United States and the European Union.

III. International legal issues related to unilateral sanctions against the Russian Federation

10. Unilateral sanctions against the Russian Federation qualify as "unilateral coercive measures" to the extent that they have been adopted by States — or regional organizations — without a mandate of the Security Council acting pursuant to Article 41 of the Charter of the United Nations (see A/HRC/30/45, para. 14).

11. It has been rightly noted that "[t]he prevailing view among international law specialists, however, is that autonomous sanctions cannot be legal per se and thus require international legal justification for their imposition".[2]

12. Sanctions on the Russian Federation should be expected to comply with the procedural and substantive conditions for recourse to lawful countermeasures, as set out by the General Assembly in its resolution 56/83 on the responsibility of States for internationally wrongful acts. In particular, the International Law Commission has noted that a "State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment".[3]

13. Moreover, as the Special Rapporteur noted in his 2016 report to the General Assembly, "[s]uch responsibility could also be engaged in a situation where, even acting with proper justification, States (or international organizations) are found to have disregarded legal preconditions for recourse to countermeasures, such as the proportionality and reversibility of the measures" (see A/71/287, para. 11).

14. The view has been widely expressed that unilateral sanctions on the Russian Federation qualify as "third-party countermeasures" under international law, to the extent that they aim at responding to grave violations of obligations owed to the international community. However, it is to be noted that the permissibility of third-party countermeasures remains unsettled in international law, and was left open in General Assembly resolution 56/83.[4]

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[2] See E. Moret, T. Biersteker, F. Giumelli et al., "The new deterrent? International sanctions against Russia over the Ukraine crisis" (Graduate Institute of International and Development Studies, Geneva, 2016), annex II.

[3] See report of the International Law Commission at its fifty-third session (A/56/10), chap. IV, E. 2., comment No. 3 on article 49. It has also been noted that, in case of sanctions, "[t]he lawfulness of the action on the international plane depends, in the first place, on the effective occurrence of the international wrongful act by the target State", Tarcisio Gazzini, "The normative element inherent in economic collective enforcement measures: United Nations and European Union practice" in *Les sanctions économiques en droit international/Economic sanctions in international law*, Linos-Alexandre Sicilianos and Laura Picchio Forlati, eds. (Leiden, Martinus Nijhoff, 2004).

[4] See General Assembly resolution 56/83, annex (arts. 48 and 54); see also e.g. Linos-Alexandre Sicilianos, "Countermeasures in response to grave violations of obligations owed to the international community" in *The law of international responsibility*, J. Crawford, A. Pellet and S. Olleson, eds.

IV. Overview of coercive measures in force against the Russian Federation

15. Unilateral coercive measures imposed against the Russian Federation involve two primary autonomous sanctions regimes: those of the United States and those of the European Union. In those sanctions regimes, some measures are directed against targets in the Russian Federation and Ukraine. In the present report, the Special Rapporteur will only focus on those measures targeting the Russian Federation.

16. Measures against the Russian Federation are reported to have been imposed with the purposes of ceasing hostilities in south-eastern regions of Ukraine, negotiating a peace agreement, enforcing a peace agreement and maintaining the territorial integrity of Ukraine. They include individual measures, such as assets freezes and travel bans, and sectoral measures, in the areas of finance, defence and oil services. They have been supplemented by a range of other States, including Australia, Canada, Japan, New Zealand and Ukraine; neighbouring Georgia and the Republic of Moldova; Montenegro and Albania, both European Union candidate countries; and States members of the European Free Trade Association, such as Iceland, Liechtenstein, Norway and Switzerland, which have aligned themselves with the some of the measures adopted by the European Union.[5]

17. The present report will not assess the legality of those measures under public international law. Such an assessment lies outside the scope of the Special Rapporteur's mandate, which focuses solely on the negative impact that unilateral coercive measures may have on the enjoyment of human rights

A. Unilateral coercive measures imposed by the United States

18. In the present section, unilateral coercive measures imposed by the United States will be referred to as "sanctions" for the sole purpose of maintaining the source country's terminology.

Overview and scope

19. The United States imposes sanctions against the Russian Federation and Crimea in the framework of a Ukraine/Russian Federation-related sanctions programme implemented by its Treasury Office of Foreign Assets Control. The sanctions programme started on 6 March 2014 with executive order 13660, issued by the President of the United States.[6]

20. Later, in further response "to the actions and policies of the Government of the Russian Federation, including the purported annexation of the Crimea region of Ukraine", the President issued executive orders 13661, 13662 and 13685 to expanded the scope of the national emergency declared in executive order 13660.In particular, order 13685 requested that additional steps be taken against the Russian Federation, and prohibited the import or export of any goods, services or technology to or from Crimea, or any new investment in Crimea by a United States national, wherever located.

21. On 29 December 2016, the Office of Foreign Assets Control imposed sanctions on five Russian entities and four Russian individuals in connection with their alleged efforts to interfere with the 2016 United States presidential election. The new sanctions were imposed

(Oxford University Press, 2010), pp. 1137-1148; and M. Dawidowicz, "Public law enforcement without public law standards? An analysis of State practice on third-party countermeasures and their relationship to the UN Security Council" in *British Yearbook of International Law*, Vol. 77, iss. 1, pp. 333-418 (January 2007); and M. Dawidowicz, "Third-party countermeasures: A progressive development of international law?" in *Questions of International Law* (June 2016) pp. 3-15.

[5] See, for example, www.consilium.europa.eu/en/press/press-releases/2015/07/28-alignment-russias-action-destabilising-ukraine/.

[6] See www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine.pdf. Executive order 13660 was issued pursuant to, inter alia, the International Emergency Economic Powers Act and the National Emergencies Act.

pursuant to executive order 13757, effective 29 December 2016, amending order 13694, addressing "cyber-related activities", by expanding the types of significant, malicious cyber-related activities that are liable to be sanctioned.[7] The Office also imposed sanctions on two other individuals in the Russian Federation for having allegedly engaged in significant, malicious cyber-related activities for private financial motives.

22. The means of implementing sanctions are established in regulations of the Office of Foreign Assets Control[8] and in determinations by the Secretary of the Treasury, after consultations with the United States Secretary of State, that the provisions of executive order 13662 shall apply to: (a) "the financial services and energy sectors of the Russian Federation economy";[9] and (b) "the defence and related materiel sector of the Russian Federation economy".[10]

23. Through a system of specific licences, the Office of Foreign Assets Control may consider on a case-by-case basis requests to authorize "transactions that are neither exempt nor covered by a general license". It may also authorize certain types or categories of activities and transactions that would otherwise be prohibited under the Ukraine/Russian Federation-related sanctions programme by issuing a general licence.

24. In summary, United States sanctions on the Russian Federation and Crimea comprise the following categories: (a) blocking sanctions targeting listed individuals and entities; (b) "sectoral" sanctions targeting specific sectors of the Russian economy; and (c) a ban on investment and a trade embargo on Crimea.

Blocking sanctions

25. Under its blocking sanctions, transactions by United States nationals, wherever located or by any person in the United States, are prohibited unless otherwise authorized or exempt, if they involve transferring, paying, exporting, withdrawing, or otherwise dealing in the property or interests in property of an entity or individual included on the Office of Foreign Assets Control's list of specially designated nationals and blocked persons. The property and interests in property of an entity that is 50 per cent or more owned, whether individually or in the aggregate, directly or indirectly, by one or more persons whose property and interests in property are blocked pursuant to any part of title 31 of the Code of Federal Regulations chapter V[11] are also blocked, regardless of whether the entity itself is listed.

26. Similar blocking measures apply to certain legal and natural persons that are now listed on the list of specially designated nationals and blocked persons pursuant to amended executive order 13694 (on "cyberactivities"). In addition to the blocking of assets and

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[7] As originally issued on 1 April 2015, executive order 13694 authorized sanctions to be imposed on any person determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be responsible for or complicit in, or to have engaged in, directly or indirectly, cyber-enabled activities:

- Originating from, or directed by persons located, in whole or in substantial part, outside the United States
- That are reasonably likely to result in, or have materially contributed to, a significant threat to national security, foreign policy, or the economic health or financial stability of the United States
- That have the purpose or effect of resulting in one of four specified harms

Now, executive order 13757 expands the types of cyber-related activities that are sanctionable under order 13694 to include "activities that have the purpose or effect of tampering with, altering, or causing a misappropriation of information with the purpose or effect of interfering with or undermining election processes or institutions".

[8] See www.gpo.gov/fdsys/granule/FR-2014-05-08/2014-10576.

[9] Determination issued on 16 June 2014 by the Secretary of the Treasury, after consultation with the Secretary of State.

[10] Determination issued on 12 September 2014 by the Secretary of the Treasury, after consultation with the Secretary of State.

[11] See www.ecfr.gov/cgi-bin/text-idx?gp=&SID=87e638fe455daf189874f552c9080605&mc=true&tpl=/ecfrbrowse/Title31/31chapterV.tpl.

measures on the prohibition of transactions, the individuals sanctioned pursuant to that order, as amended, are generally subject to a prohibition from entering the United States.

Sectoral sanctions on the Russian economy

27. The sectoral sanctions imposed on specified persons operating in the Russian economy were implemented under executive order 13662 through four directives issued by the Office of Foreign Assets Control. Those directives impose prohibitions on United States nationals and within the United States for certain specified transactions with entities made subject to the relevant directive, as identified on the sectoral sanctions identification list. The property and interests in property of an entity that is 50 per cent or more owned, whether individually or in the aggregate, directly or indirectly, by one or more sanctioned persons are also sanctioned, regardless of whether the entity itself is listed on the list. The property and interests in property of those persons are not blocked, nor are transactions with them prohibited beyond the restrictions.

28. Directive No. 1 of the Office of Foreign Assets Control, as amended, prohibits all transactions in provisions of financing for, and other dealings in, new debt of longer than 30 days maturity or new equity of persons determined to be subject to directive 1, their property, or their interests in property; and all activities related to debt or equity issued before 12 September 2014 that would have been prohibited by the prior version of directive No. 1, which extended to activities involving debt of longer than 90 days maturity or equity if that debt or equity was issued on or after the date a person was determined to be subject to directive No. 1.

29. Directive No. 2, as amended, prohibits transacting in, providing financing for or otherwise dealing in new debt of longer than 90 days' maturity of the persons subject to directive No. 2, their property, or their interests in property.

30. Directive No. 3 prohibits transacting in, providing financing for or otherwise dealing in new debt of longer than 30 days' maturity of the persons subject to directive No. 3, their property, or their interests in property.

31. Directive No. 4 prohibits providing, exporting or re-exporting, directly or indirectly, goods, services (except for financial services) or technology in support of exploration or production for deep-water, Arctic offshore or shale projects that have the potential to produce oil in the Russian Federation or in maritime area claimed by the Russian Federation and extending from its territory, and that involve any person subject to directive No. 4, its property or its interests in property.

B. Unilateral coercive measures imposed by the European Union

Background and overview of legal authorities

32. European sanctions enacted since 2014 in the context of relations between the Russian Federation and Ukraine constitute a complex system involving a number of different legal instruments, most of which have been subject to amendments, expanded or modified over time. At the outset, it must be noted that some European Union sanctions are applied specifically on the Russian Federation — and some of its officials, individuals, entities and a variety of economic sectors and activities — while other sanctions targeting Crimea are technically considered — in line with the policy of the European Union not to recognize the "annexation" of Crimea by the Russian Federation — as applied on Ukraine.

Sanctions on the Russian Federation

33. The sanctions regime implemented since July 2014 and subsequently extended to the present day[12] (measures in force as at March 2017) is described below.

[12] Relevant legal instruments adopted at the European Union level are: Council Decision 2014/512/CFSP (OJ L 229, 31.7.2014, p. 13) and Council Regulation (EU) No 833/2014 (OJ L 229, 31.7.2014, p. 1), with corrigendum (OJ L 246, 21.8.2014, p. 59). Later amended by Council Decision

Arms embargo

34. In July 2014, the European Union enacted an embargo on the import and export of arms and related material to or from the Russian Federation and on related materiel and services, extending also to dual-use goods, technology and related services.[13]

Restrictions on exports of energy-related equipment

35. The European Union put in place controls on export of certain equipment for the Russian energy industry (relating to deep-water, Arctic or shale oil projects). Under that regime, exports of certain energy-related equipment and technology to the Russian Federation are subject to prior authorization by competent authorities of European Union member States. Export licenses are to be denied if products are destined for oil exploration and production in waters deeper than 150 metres or in the offshore area north of the Arctic Circle, or projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing. The following services necessary for the above-mentioned projects may not be supplied: drilling, well testing, logging and completion services and supply of specialized floating vessels.[14]

Financial restrictions

36. European Union sanctions also include restrictions on the issuance of or trade in certain "bonds, equity or similar financial instruments". European Union nationals and companies therefore may no longer buy or sell new bonds, equity or similar financial instruments with a maturity exceeding 30 days, issued by five major state-owned Russian banks; three major Russian energy companies; three major Russian defence companies; or subsidiaries outside the European Union of the entities above or those acting on their behalf or at their direction. Assistance in relation to the issuing of such financial instruments is also prohibited. European Union nationals and companies may also not provide loans with a maturity exceeding 30 days to the entities described above.[15]

Targeted measures

37. The European Union had applied asset freezes and visa bans to 150 persons, while 37 entities have been subject to asset freezes in the European Union. That includes persons and entities "responsible for action against Ukraine's territorial integrity, persons providing support to or benefitting Russian decision makers and 13 entities in Crimea and Sevastopol that were confiscated or that have benefitted from a transfer of ownership contrary to Ukrainian law".[16]

C. Unilateral coercive measures imposed by other States

Canada

38. Canada has applied unilateral coercive measures on the Russian Federation that closely mirror those taken by the United States and the European Union, under its Special Economic Measures Act. On 17 March 2014, its "Special Economic Measures (Russia) Regulations" came into force and have been amended a number of times since then. The measures include an asset freeze and dealings prohibition on designated persons, including

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2014/659/CFSP (OJ L 271, 12.9.2014, p. 54) and Council Regulation (EU) No 960/2014 (OJ L 271, 12.9.2014, p. 3), Council Decision 2014/872/CFSP (OJ L 349, 5.12.2014, p. 58) and Council Regulation (EU) No 1290/2014 (OJ L 349, 5.12.2014, p. 20), Council Decision (CFSP) 2015/1764 (OJ L 257, 2.10.2015, p. 42), and Council Decision (CFSP) 2016/1071 (OJ L 178, 2.7.2016, p. 21).

[13] "EU sanctions against Russia over Ukraine crisis", European Union Newsroom, 16 March 2017, available at https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en.

[14] See https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en.

[15] Ibid.

[16] Ibid.

individuals and entities. It is prohibited in particular for any person in Canada or any Canadian outside Canada to enter into or facilitate, directly or indirectly, any transaction — regarding property, financial or other services — related to a designated person.

39. The aforementioned regulations also impose restrictions on the financial and energy sectors. With some exceptions, they prohibit any person in Canada or Canadians abroad from dealing in new debt of longer than 30 days' maturity in relation to a number of listed entities, or 90 days maturity in relation to other entities. In addition, they prohibit any person in Canada or Canadians abroad from dealing in new securities in relation to listed entities; and prohibit the export, sale, supply or shipping of certain goods intended for use in offshore oil (depth greater than 500 metres), shale oil or Arctic oil exploration and production. That includes a ban on the provision of any financial, technical or other services related to the goods subject to this prohibition. Causing, assisting or promoting prohibited activities is likewise prohibited.[17]

Australia

40. Australia implements an autonomous sanctions regime in relation to the Russian Federation that started in March 2014. The measures currently include restrictions on the export or supply of goods, restrictions on the export or provision of service, on the import, purchase and transport of goods, on commercial activities, targeted financial sanctions and travel bans.[18]

Norway

41. Norway has adopted restrictive measures based on the situation in Ukraine, corresponding to the measures adopted by the European Union. This encompasses asset freeze measures and travel restrictions and limitations on the provision of goods and services to the military, energy and financial sectors of the Russian Federation. Particular measures apply to trade and investments involving Crimea.[19]

Switzerland

42. In March 2014, Switzerland decided not to align itself with the sanctions taken by the European Union against the Russian Federation in relation to the situation in Ukraine. However, Switzerland took measures that serve to avoid the circumvention of international sanctions in relation to the situation of Ukraine over Swiss territory. Those measures reflect the Swiss policy of neutrality and the non-recognition of the annexation of Crimea by the Russian Federation. They include various prohibitions, as well as notification and authorization requirements for certain financial and commercial affairs.

Japan

43. Japan announced in July 2014 an asset freeze in Japan of the individuals and organizations considered to have been directly involved in the annexation of Crimea and destabilization of eastern Ukraine. It announced publicly that it would take coordinated action in line with the position of the European Union with regard to the new projects for the Russian Federation of the European Bank for Reconstruction and Development.[20]

New Zealand

44. In 2014, New Zealand suspended negotiations on a free-trade agreement following events in Ukraine.[21] It has also applied an entry ban to a list of individuals.

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[17] See www.international.gc.ca/sanctions/countries-pays/Russia-Russie.aspx?lang=eng.

[18] See http://dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/Pages/russia.aspx.

[19] See www.regjeringen.no/en/aktuelt/Restrictive-measures-against-Russia-/id765896/.

[20] See www.mofa.go.jp/press/release/press2e_000003.html.

[21] See www.mfat.govt.nz/en/countries-and-regions/europe/russia/.

V. Unilateral coercive measures imposed as "countermeasures" by the Russian Federation

45. The Russian Federation has imposed several measures in response to the unilateral coercive measures applied by the United States, the European Union and other countries following the events in Crimea and eastern Ukraine.

46. On 20 March 2014, the Russian Federation imposed visa bans against nine United States officials, including a number of senators and presidential assistants. On 24 March 2014, it imposed visa bans on 13 Canadian officials, including members of Parliament. Similar measures against European officials were only introduced in May 2015 with the release of a blacklist of 89 European Union officials and politicians banned from entering the Russian Federation. The list remains active.

47. On 6 August 2014, the Russian Federation started to impose economic coercive measures, consisting of a one-year ban on agricultural products and foodstuffs, as well as a visa ban list. The European Union protested what it considered to be the arbitrary inclusion of those on the visa ban list.

48. The Government of the Russian Federation argues that its sanctions represent a legitimate form of retaliation. The federal customs service released a list of products that had been banned from importation into the Russian Federation from Canada, the United States and the European Union. The list included poultry, fish, seafood, milk and milk products, vegetables, fruits, nuts, meat of bovine animals, pork and meat products.

VI. Assessment of the adverse impact of unilateral coercive measures on human rights

49. Most of the cases of unilateral coercive measures investigated by the Special Rapporteur since the mandate was created have involved measures imposed on developing countries. This is the first time that the mandate has addressed unilateral coercive measures targeting such a powerful and strategically important player of the international community. The high level of integration of the Russian Federation in the global economy and the capacity of its economy to react immediately to a changing reality makes this a truly unique case.

50. Sanctions are concerted among European Union member States and the United States and other source countries targeting the Russian Federation, but as far as implementation is concerned the measures vary to a certain degree. In response to the unilateral coercive measures, and as indicated above, the Russian Federation has applied its own countermeasures that have entailed costs for both source and target countries.

Impact of measures taken

51. Application of the unilateral coercive measures began at the start of 2014, a time when the price of oil fell substantially. Thus, two shocks occurred simultaneously: the "oil shock" and the "sanctions shock". In view of the complexity of the mix of those causes, it is difficult to determine the discrete impact of the sanctions shock. According to some unofficial estimates provided to the Special Rapporteur in Moscow, they may have caused at most an average reduction of 1 per cent of the gross domestic product (GDP) of the Russian Federation between 2014 and 2016. It remains that the main adverse impact of the reversal of economic fortunes was attributable to the drop in oil prices.

52. The following evolution of general living standards has been observed on the basis of the data provided by the Federal State Statistics Service; part of the evolution can clearly be ascribed to the "sanctions shock", though it is impossible to quantify precisely to what extent:

(a) The trend of overall personal income of the population, which had been increasing at a rate of 4.6 per cent in 2012 and 4 per cent in 2013, was reversed thereafter.

falling successively by 0.7, 3.2 and 5.9 per cent for the following years up to and including the first quarter of 2016;

(b) The number of people living below the poverty line (defined to be 10,000 roubles), which had been falling since 1992 with very few exceptions, rose from 15.5 million in 2013 to 19.8 million in 2016, or 13.5 per cent of the total population;

(c) Of those living under the poverty line, some of the most vulnerable population groups — the 7-16 age group, women of working age and pensioners — were reported to have been most affected.

53. In terms of macroeconomic analysis, the combined impact of the two shocks reduced growth from 1.3 per cent in 2013 to 0.7 per cent in 2014 and to - 2.8 per cent in 2015. As a result of adaptation to the post-shock situation, there was a turnaround in economic activity already in the first quarter of 2016, with a negative growth rate of - 0.02 per cent, despite the fact that oil prices remained low. That rate moved back into positive territory in 2017 without any lifting of unilateral coercive measures. Over the past 12 months, the rouble appreciated by 15 per cent against the dollar. This is evidence of a successful adjustment.

54. While the unemployment rate overall remained around 5.5 to 5.6 per cent, small and medium-sized enterprises lost over 15 per cent of their employees over that period and were incited to reduce investment by the climate of unpredictability resulting from the sanctions.

55. The reasons why the impact of economic sanctions on the enjoyment of human rights was not more severe in the country seem related to the following facts:

(a) The Government applied very effectively a counter-cyclical policy by letting the rouble float and by increasing the share of the State sector to substitute for the sanction-imposed ban on foreign funding for the corporate sector beyond 30 days, by reducing considerably the rate of inflation through conservative management of the economy and by ex-post compensation of inflation losses incurred by pensioners;

(b) The economy demonstrated great resilience and a capacity to adapt to new circumstances through Government-assisted restructuring to promote local funding of projects formerly funded by external sources;

(c) The diversification of the economy away from oil was given new impetus;

(d) Emphasis on research was increased, returning to an earlier stage when, in many sectors, including space technology, the Russian Federation was at the forefront (it should be noted that, according to Russian officials, cooperation with the United States in advanced space technology was maintained, including for the supply of engines for spacecraft, despite the ban on the export of advanced drilling technology by the United States); this enabled the Russian Federation to enhance its oil production in the Arctic by developing its own capacities for horizontal drilling and its production of shale oil, for which it had previously relied on foreign partners;

(e) Effective import substitution technologies were put in place, in particular in agriculture, to dispense with imports from the European Union that were the subject of retaliatory measures;

(f) A policy was quickly introduced to pivot towards other partners in Asia and other regions.

56. As in many other countries targeted by sanctions, there was a "rally around the flag" reaction, which led the population to accept the inconveniences caused by the unilateral coercive measures.

Rationale of the unilateral coercive measures applied to the Russian Federation

57. The mandate is not competent to discuss the adequacy of the unilateral coercive measures applied to the Russian Federation in terms of the political issues that led to their imposition. The present assessment is therefore limited to the consistency of the measures adopted.

58. The Russian case study offers an opportunity to review the effectiveness of unilateral coercive measures applied by large advanced economies against one another. The example of the Russian Federation demonstrates the expected versatility of a relatively well-off country with a variety of resources, a highly trained population and a multiplicity of trading partners.

59. The adverse human rights impacts of the measures has been mitigated by the fact that they were not all-encompassing, unlike previous measures against certain developing countries that the mandate has reviewed.

60. In a context of globalization, for a country like the Russian Federation, which is fully integrated into the world economy, measures for trade diversion — whether through protectionism or through unilateral coercive measures — can be self-defeating if they lead to a "beggar-thy-neighbour" policy. It is fortunate therefore that the retaliatory measures themselves were limited in scope.

61. Furthermore, in such a globalized context, one must not lose sight of the possible backlash of unilateral measures, even without retaliation. Thus, for instance, one of the largest banks in the Russian Federation, Sberbank, has a part of its capital in equities of which one third is owned by foreign investors from sanctioning countries. Thus, when the bank cannot obtain foreign financing above 30 days for its clients, its profits are affected, which, in turn, reduces the price of its shares and causes losses for their owners also in source countries. Furthermore, every year the State floats internationally 10-year euro-dollar bonds that are reserved for foreign purchasers and are heavily subscribed. In addition, every week it auctions other shorter-term bonds in roubles that are also subscribed by foreign buyers. Rationing of foreign loans to the Russian economy is therefore of limited effectiveness.

62. Different data are provided by the media and academic circles in source countries estimating the cost incurred through the measures by source countries, especially in the European Union.

63. The most credible approximation is of $3.2 billion a month, according to a working paper by the Centre d'Etudes Prospectives et d'Informations Internationales.[32] In an interview with the Special Rapporteur, European farmers and a confederation of European agricultural cooperatives deplored that the losses were attributable to a political dispute between the European Union and the Russian Federation, in which European Union farmers had no role or responsibility yet were the ones that had to "pay the price".[33]

64. The rough estimate of the adverse impact of the sanctions on the Russian Federation, if disentangled from the oil shock, is an average loss of 1 per cent of GDP. That seems to be a reasonable figure since, after "digesting" the oil shock, the difference between actual and potential GDP for 2017 is of about 0.80 per cent according to the International Monetary Fund.[34] That output gap would amount to a direct loss therefore of some $15 billion per annum for the Russian Federation or a total of $55 billion so far.

65. The resulting overall income loss of $155 billion is shared by source and target countries. Although both source and target countries can internalize those losses, it is not clear that any partner is cowed by them or indeed that any rights holder, least of all European smallholder farmers, benefits from them. Meanwhile, business opportunities are forgone, curtailing the right to development of trading partners. Even if direct losses to the Russian Federation from unilateral coercive measures were twice as high as provided in the above estimate, source countries are having to suffer equally or more from the sanctions than the country they target. They may also be more vulnerable as, unlike the Russian Federation, they do not all have a consistent international trade surplus or such high foreign exchange reserves, which, in the case of the Russian Federation, remained consistently

[32] Available from www.cepii.fr/PDF_PUB/wp/2016/wp2016-16.pdf.

[33] See also www.copa-cogeca.be/Download.ashx?ID=1402103&fmt=pdf, and the report of the Special Rapporteur (A/HRC/36/44/Add.2).

[34] See www.economist.com/news/economic-and-financial-indicators/21722184-output-gaps.

above $300 billion since sanctions were applied.[37] So, while the sanctions were more political than economic, they have led in the process to a regrettable deterioration of the standard of living of the most vulnerable population groups in the Russian Federation and have also adversely affected smallholder farmers in Europe.

VII. Observations and recommendations

66. **The wave of globalization that has engulfed the Russian Federation has spread the value chain across its borders with Europe and to a lesser extent has stretched to the United States. It is therefore becoming realistically impossible to disentangle the links of that value chain in a way that would introduce a clean cut of those links situated in the Russian Federation without weakening the rest of the chain through what has misleadingly been referred to come to as "surgically accurate" measures.**

67. **The unilateral coercive measures are intended to serve as a deterrent to the Russian Federation in the context of the prevailing political standoff in the region. They do however carry unintended effects on producers that have nothing to do with the situation, both in Europe and among the most vulnerable groups in the Russian Federation. The Special Rapporteur considers that, after three years of implementation of unilateral coercive measures targeting the Russian Federation, a review of their effectiveness in achieving their proclaimed goal is overdue.**

68. **The Special Rapporteur recommends that the review be engaged upon without delay in the search for effectiveness in the pursuit of desired outcomes and in a way that spares innocent civilians in source and target countries from unintended adverse human rights impacts.**

69. **Targeted sanctions have been imposed on certain individuals so as to avoid unintended damage on innocent people. The impact they have on due process and the rule of law has already been discussed in previous reports of the Special Rapporteur to the Human Rights Council and the General Assembly. However, during his visit to Moscow, the Special Rapporteur was informed that humanitarian exemptions from sanctions applied by the European Union are not being systematically applied to "designated persons". Thus, a Russian businesswoman whose spouse was hospitalized in a western European clinic, found out upon attempting payment of her medical bill that his western bank account had been blocked and could not be drawn upon even for such humanitarian items of expenditure. This is all the more surprising since competent European Union authorities are committed to taking into account the "fundamental rights of designated persons and entities when granting exemptions" as provided by the European Union Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the European Union Common Foreign and Security Policy.**

70. **The Special Rapporteur thus recommends a clear recognition that the competent authorities are under a legal obligation to provide systematically for effective humanitarian exceptions in sanctions instruments. As stated in the Guidelines, such mandatory humanitarian exceptions should cover, inter alia, the "basic needs of designated persons ... including for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums and public utility charges", and humanitarian purposes, such as, for example, delivering or facilitating the delivery of assistance, including medical supplies, food or the transfer of humanitarian workers and related assistance or for evacuations from a targeted country. Moreover, those exceptions should be notified to banks from all source countries and to banks accepting extraterritorial implementation of such individual sanctions by source countries, along with any decision to block individual accounts.**

71. **The Special Rapporteur also recommends that priority attention be given to ensuring immunity from unilateral coercive measures for people elected to a**

[37] See *The Economist*, June 10-16 2017, p. 62.

parliamentary assembly, who are being targeted for action taken as decided democratically by public suffrage and who are thereby exercising their function exclusively on the basis of compliance with a national constitution. Parliamentary immunity is recognized worldwide and this must be for good reason.

72. The Special Rapporteur heard from official Russian and Ukrainian sources alike that the people in Crimea are those who suffer most from the unilateral coercive measures currently in force. The Special Rapporteur considers that they should not be made to pay collectively for what is a complex political crisis over which they have no control, and that their sufferings should not serve as an argument to solve political differences.

73. In accordance with General Assembly resolution 71/205, the Special Rapporteur reiterates his call on the Russian Federation to ensure the proper and unimpeded access of international human rights monitoring missions to Crimea, and on Ukraine to allow access to its territory in accordance with its national legislation and relevant international law standards. An official visit to Crimea to assess the adverse effect of unilateral coercive measures on the population is overdue. Either the present mandate holder or another concerned with specific basic rights that appear to be in jeopardy should be given an opportunity to gain access to that territory in compliance with international law.

74. Finally, the Special Rapporteur reiterates with respect to his mandate as set out in Human Rights Council resolution 27/21, adopted by majority vote, his previous recommendation made pursuant to his visit to the Sudan, i.e. that diplomatic missions of States that have not supported the resolution establishing a given mandate nevertheless accept, if the resolution was adopted by the Human Rights Council, to cooperate in good faith with the relevant mandate holder during his or her country visits. The latter should not be penalized for the fact that his was not a consensus mandate as he has no responsibility for the situation and is only following the instructions of the Council. An implicit group position for diplomatic missions not to engage with such mandates during field visits would deprive those who take it of the moral authority to criticize States from other groups failing to play by the rules of the Council. If generalized, such a position could lead to the undoing of the Human Rights Council itself, of which the special procedures are a key component.